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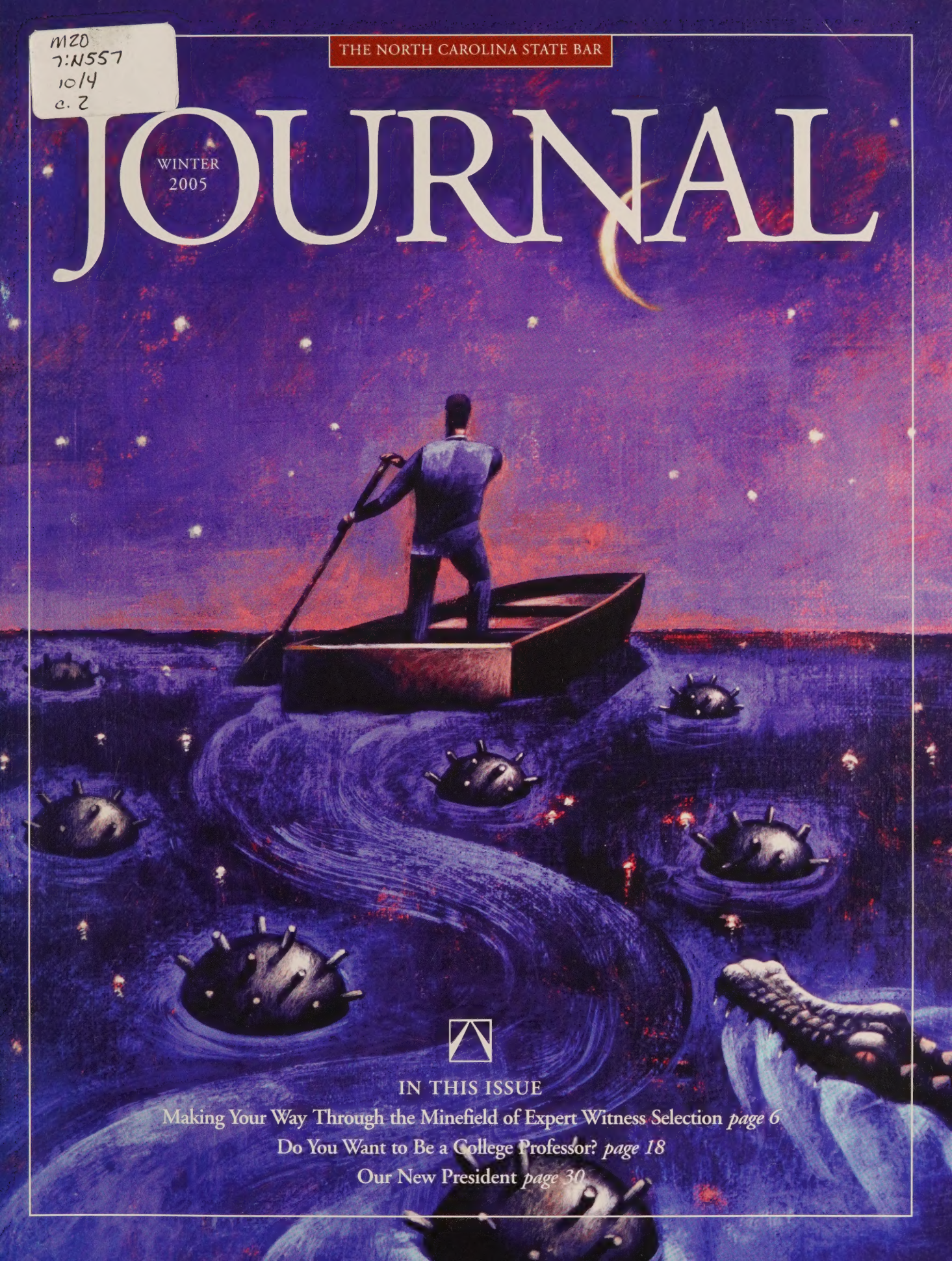

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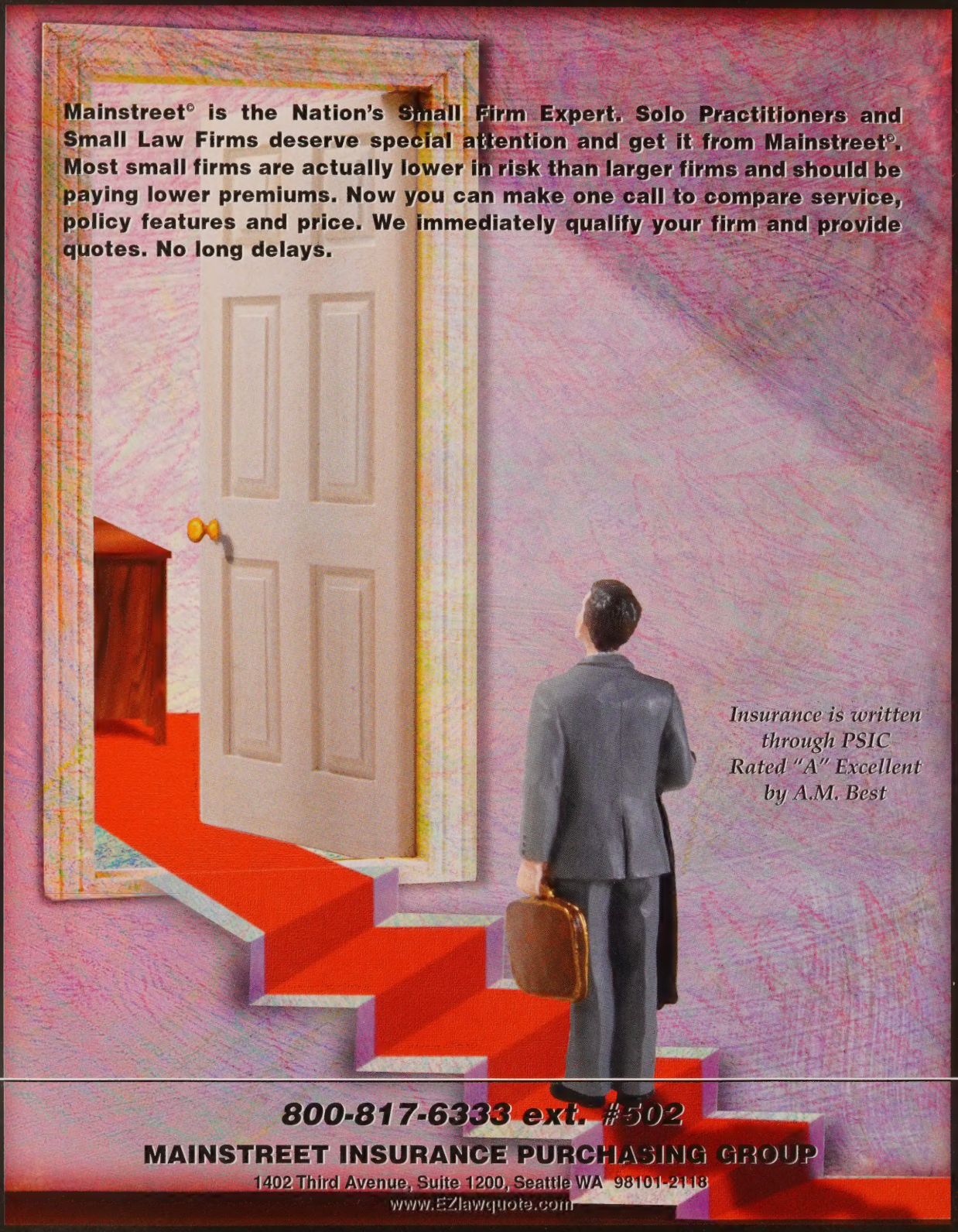

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THE
NORTH CAROLINA
STATE BAR
JOURNAL

Winter 2005
Volume 10, Number 4

 The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, 208 Fayetteville Street Mall, Raleigh, NC 27601. Member rate of $6.00 per year is included in dues. Nonmember rates $10.70 per year. Single copies $3.21. The *Lawyer's Handbook* $10.70. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620. Periodicals postage paid at Raleigh, NC, and additional offices. Opinions expressed by contributors are not necessarily those of the North Carolina State Bar. POSTMASTER: Send address changes to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The *North Carolina Bar Journal* invites the submission of unsolicited, original articles, essays, and book reviews. Submissions may be made by mail or e-mail (ncbar@bellsouth.net) to the editor. Publishing and editorial decisions are based on the Publications Committee's and the editor's judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of the *Journal*. The *Journal* reserves the right to edit all manuscripts.

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Contents

FEATURES

Continued on page 4.

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Contents

Continued from page 3.

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1. Publication Title	2. Publication Number	3. Filing Date
North Carolina State Bar Journal	0 0 0 1 - 5 0 4 9	9-23-2005
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	4	$10.00

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*
208 Fayetteville Street Mall
Raleigh, NC 28403
Contact Person: Jennifer Duncan
Telephone: 919.828.4620

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
208 Fayetteville Street Mall
Raleigh, NC 28403

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

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11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☐ None

Full Name	Complete Mailing Address

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*
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☒ Has Not Changed During Preceding 12 Months
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PS Form **3526,** October 1999 *(See Instructions on Reverse)*

13. Publication Title: North Carolina State Bar Journal		14. Issue Date for Circulation Data Below: Fall 2005 (September)	
15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*		20,300	20,670
b. Paid and/or Requested Circulation	(1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. *(Include advertiser's proof and exchange copies)*	19,890	20,240
	(2) Paid In-County Subscriptions Stated on Form 3541 *(Include advertiser's proof and exchange copies)*	0	0
	(3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	0	0
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f. Total Free Distribution *(Sum of 15d. and 15e.)* ▶		100	100
g. Total Distribution *(Sum of 15c. and 15f)* ▶		19,990	20,340
h. Copies not Distributed		310	330
i. Total *(Sum of 15g. and h.)* ▶		20,300	20,670
j. Percent Paid and/or Requested Circulation *(15c. divided by 15g. times 100)*		99.5%	99.5%

16. Publication of Statement of Ownership
☒ Publication required. Will be printed in the Winter issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: Jennifer R. Duncan, Director of Communications — Date: 9-23-2005

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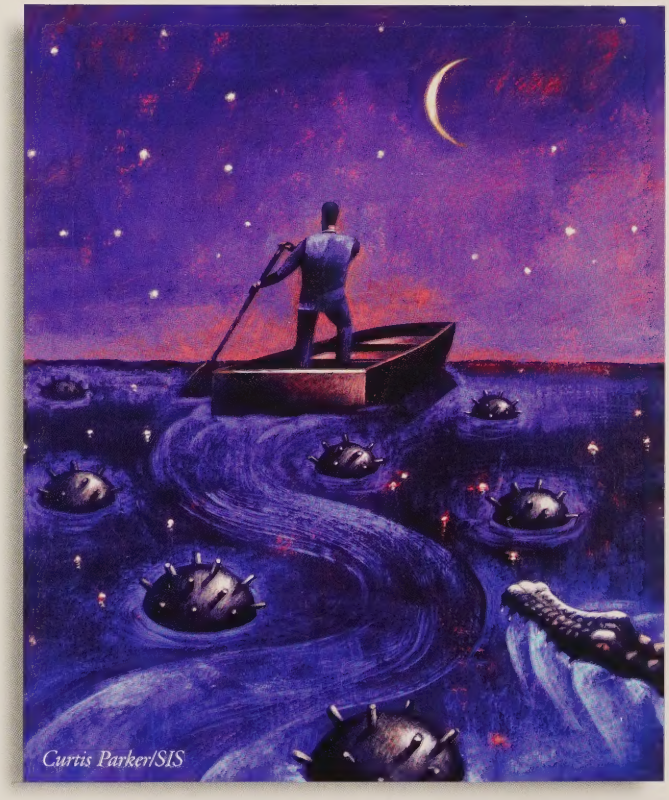
Making Your Way Through the Minefield of Expert Witness Selection in Malpractice Cases in North Carolina

By Mark Canepa

Here's a riddle: When is a board certified medical doctor with 20 years of directly related surgical experience not qualified to testify as a surgical expert on the standard of care in a medical malpractice case? When he or she is asked to testify in a North Carolina courtroom.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Increasingly in North Carolina, a significant issue at trial in malpractice actions involves the somewhat loose definition of the "same or similar communities" requirement of the standard of care. Physicians and surgeons from other states—or even within North Carolina—who might otherwise be well-qualified experts, can be precluded from testifying at trial if they are not familiar with the community where the malpractice action arose. Frequently, the biggest issue at trial has become which standard of care are we talking about: Is it the standard of care practiced in Raleigh, Charlotte, or in Hendersonville? Is it the standard observed in North Carolina, or in Georgia, or perhaps New York? Is there—or should there be—any difference?

Since the phrase "standard of care" is at the heart of any malpractice case, one would think that by now the courts and the legislature would have either created, or at least worked out through judicial opinion, a working definition of the standard to guide counsel in his or her selection of experts both prior to, and during, discovery. Unfortunately, as a number of recent appellate decisions indicate, that is not the case.

This article discusses the perils and pitfalls of qualifying expert witnesses under the "same

or similar communities" requirement in malpractice actions pursuant to N.C.Gen.Stat. § 90-21.12. It analyzes recent appellate court opinions on the subject—which are varied and not altogether consistent—and concludes with suggestions as to how to ensure that your experts are allowed to reach the most important issue in the case—the standard of care—when they are called to the stand at trial.

The Statute

In most jurisdictions, an otherwise-qualified physician may testify on the standard of care from a national point of view in any medical malpractice action.

For example, an orthopedic surgeon from Duke can testify at trial in California that the standard of care for an arthroscopic repair of a torn rotator cuff is the same in Mendocino as it is in the Triad. The fact that Mendocino, California, is a coastal resort with limited medical facilities and resources, and Duke is a leading national medical center, has no impact on the admissibility of the expert's opinion. It simply goes to the weight of the testimony

However, the same is not true in the reverse: A physician from a leading medical facility in California—or any other state—can be blocked from testifying in a North Carolina malpractice action unless that expert can testify, with some authority, that he or she is familiar with the standard of practice in the very community where the alleged negligence took place.

The reason for this is that North Carolina has refused, for the most part, any attempt to recognize a national standard of care in connection with malpractice suits that are filed here. This refusal is codified in N.C.Gen.Stat. § 90-21.12, which provides, in pertinent part:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of fact is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated **in the same or similar communities** at the time of the alleged act giving rise to the cause of action.

N.C. Gen.Stat. § 90-21.12 [emphasis added]

The rationale for the statute is easy to understand. The Legislature did not want local physicians, with limited resources, to be judged by distant experts who practiced in cities with unlimited access to the latest medical technology and support. While the rule was never meant to insulate local health care providers from any and all outside influence, it also reflected a common sense approach to medicine that recognizes that there are different approaches to medical practice in different parts of the country. As the North Carolina Supreme Court observed in a malpractice action decided just one year before § 90-21.12, not all injuries are uniform and not all treatment is handled the same way in every community:

> The medical profession in Alaska, for example, would be informed and knowledgeable on the treatment of snow blindness, frozen feet, and frostbitten lungs, but they would be without experience in the treatment of rattlesnake bites. A Florida doctor would know about snake bites, but not about frozen feet…

Rucker v. High Point Memorial Hospital, 285 N.C. 519, 527-528, 206 S.E.2d 201-202 (1974).

Unfortunately, in recent years the rule set forth in § 90-21.12 has turned into a minefield for lawyers on both sides of the bar, leaving a trail of summary judgments, directed verdicts, and reversed decisions in its wake. And the biggest problem—by far—is figuring out what "in the same or similar communities" really means.

What Community Are We Talking About?

Does § 90-21.12 require that your expert must be familiar with the exact community where the alleged malpractice took place?

The answer to that question is probably no, but it sure helps if you educate your expert about the community in question. And there has been plenty of confusion on this issue—for the bench and the bar.

Pitts v. Nash Day Hospital, 605 S.E.2d 154 (2004), is a good example of such confusion.

Pitts was a wrongful death action filed by the family of a 28-year-old woman who died the day after a laparoscopic surgery at the Nash Day Hospital in Rocky Mount.

At trial, Plaintiffs offered the testimony of Daniel M. Strickland, MD, on the standard of care. The trial judge allowed Plaintiff's counsel to make three separate attempts to tender Dr. Strickland as an expert. Each time, defense counsel objected, contending that Dr. Strickland was not familiar with the standard of care in Rocky Mount "or a similar community." The last attempt to qualify Dr. Strickland came after a 45-minute recess during which the doctor drove around the community, consulted the phone book, and otherwise tried to get an impression of the local area so as to allow him to finally meet the "same or similar community rule." *Pitts v. Nash Day Hospital, Inc.*, 605 S.E.2d 154, 155-159.

But to no avail.

The court found that Plaintiff's expert was not able to competently testify on the community standard in Rocky Mount. With no expert, the Plaintiffs' case was finished, and a directed verdict was granted.

On appeal, a divided appellate panel reversed.

First, the appellate court noted that expert testimony that a particular procedure is governed by a national standard is not, in and of itself, fatal to the introduction of that expert's testimony at trial. The expert's opinion must be taken as a whole, noted the court, which went on to observe that Dr. Strickland had training and experience that was similar to that of the defendant, and that both doctors had practiced in multiple communities within North Carolina. Dr Strickland was licensed in five states, and at the time of trial practiced in West Jefferson, North Carolina, said the court. The evidence presented at trial also showed that Dr. Strickland was familiar not only with the equipment used in the laparoscopic procedure, but also with the physical and financial environment in Rocky Mount. Accordingly, held the court, he should have been allowed to testify. *Pitts v. Nash Day Hospital, Inc.*, 605 S.E.2d 154, 156-157.

The dissent was unconvinced.

In the opinion of Justice Steelman, the trial judge was correct in excluding Dr. Strickland, because, although Dr. Strickland practiced in several different communities in North Carolina, he had no basis for testifying as to the standard of practice in Rocky Mount. Justice Steelman noted the following testimony in his dissent:

Q: [Defense counsel:] So, to summarize, what you know about the standard of care for OB-GYN surgeons practicing in Rocky Mount is that you've practiced in other small towns in North Carolina, you have driven past the hospital here, you have driven around enough to have knowledge in passing of what the industrial base was, and you've looked at

"After reading the majority opinion in *Pitts*, one would think that, in addition to medical records and depositions, counsel had better send their expert an almanac, the Yellow Pages, and a chamber of commerce brochure before calling them to the stand at trial."

the telephone book to see what the median income and population is. Is that basically what your basis is, Doctor?

A: [Dr. Strickland:] My basis for concluding that they are similar?

Q: Is that your basis—is that the basis of what you know about Rocky Mount, North Carolina, and the standard of practice here?

A: I suppose that's accurate.

Pitts v. Nash Day Hospital, Inc., 605 S.E.2d 154, 158-159.

After reading the majority opinion in *Pitts*, one would think that, in addition to medical records and depositions, counsel had better send their expert an almanac, the Yellow Pages, and a chamber of commerce brochure before calling them to the stand at trial.

Sound unnecessary?

Then consider another very recent case, *Barham v. J. Hawk MD, et al* 165 N.C. App. 708, 600 S.E.2d 1 (2004), review allowed 359 N.C. 410, 612 S.E.2d. 316 (NC April 16, 2005).

In *Barham*, a patient's estate brought a malpractice action against the defendant, alleging that the physician's improper treatment of a cyst-like growth in the patient's ear resulted in chronic infection and, ultimately, death. At trial, the defendant called one of the decedent's subsequent treating physicians, Dr. Danko Cerenko of Atlanta, to testify not only regarding his own treatment of the patient, but also to testify on the standard of care.

Plaintiffs objected to Dr. Cerenko's testifying on the standard of care, based on § 90-21.12. Both parties conducted voir dire. Clearly, Dr. Cerenko was not familiar with Hendersonville. However, defense counsel posed hypothetical questions to Dr. Cerenko in which he asked the expert to assume facts relating to the defendant's care, and to also assume facts about Hendersonville itself. These "assumed" facts included the city's population, the size of its hospital, the number of physicians there, and the number of specialists there. After assuming these facts, Dr. Cerenko said that he was familiar with the standard of care in the defendant's community. *Barham v. J. Hawk MD*, 165 N.C. App. 708, 600 S.E.2d 1, 4-5.

It was a good try by defense counsel, but it didn't work.

The court of appeals agreed with the trial judge, who allowed the doctor to testify regarding his own treatment of the decedent, but not on the standard of care. Dr. Cerenko admitted that he "knew nothing about Hendersonville, had no idea of the size of the community, knew nothing about the hospital in Hendersonville or its resources, and had no knowledge about the physicians practicing in that area," said the court. The only information he had was from the hypotheticals posed by defense counsel and this was not enough: "This testimony establishes that Dr. Cerenko neither had any knowledge about the standard of care in Hendersonville nor had any knowledge of the resources available in Hendersonville sufficient to be able to testify about the standard of care in similar communities." *Barham v. J. Hawk MD*, 165 N.C. App. 708, 600 S.E.2d 1, 5-6.

The Education of Your Expert

The court in *Barham* did not say that an expert could not educate himself about a particular city and its resources prior to taking the stand.

In *Coffman v. Roberson* 153 N.C.App. 618, 571 S.E.2d 255 (2002) review denied 356 N.C. 668, 577 S.E.2d 111 (N.C. Feb. 27, 2003), the court allowed an expert to testify pursuant to § 90-21.12 based partly on internet research he conducted to become familiar with the defendant's city.

In *Coffman*, Plaintiffs alleged that a pregnancy was terminated as a result of a negligent diagnosis of an ectopic pregnancy. Plaintiffs offered two experts at trial on the standard of care. There was no indication in the court's opinion to suggest that either expert had ever been to, or practiced, in Wilmington where the alleged negligence took place. Nevertheless, and over objection of defense counsel, both experts were allowed to testify under § 90-21.12. The jury returned a verdict for the Plaintiffs. *Coffman v. Roberson* 153 N.C.App. 618, 571 S.E.2d 255

On appeal, Defendant contended, among other things, that the trial court should not have allowed the Plaintiff's two experts to testify, as they were not familiar with the community standard in Wilmington. The appellate court affirmed.

The court found that internet research conducted by Plaintiff's experts was enough to qualify under the statute: "At trial, Dr. Horner testified that he was familiar with the standard of care with respect to obstetrics, gynecology, and sonography in communities similar to Wilmington, North Carolina," said the court. "He based this opinion on internet research about the size of the hospital, the training program, and the AHEC (Area Health Education Center) program…This testimony is sufficient to satisfy the requirements for N.C. Gen.Stat.§ 90-21.12." Likewise, the remaining expert was also allowed to testify as the result of internet research he had conducted. *Coffman v. Roberson* 153 N.C.App. 618, 624-625, 571 S.E.2d 255, 259. *See also Billings v. Rosenstein, MD.* 2005 WL 2648953 (trial court erred in disallowing expert opinion based on Section 90-21.12).

So although an expert cannot become acquainted with your community while he or she is on the stand (by hypotheticals, as in *Barham*), they can apparently become qualified by doing their own research (or driving around, as in *Pitts*), even on the internet, prior to trial.

But the expert better not forget what he or she learned about the local community before taking the stand.

In *Smith v. Whitmer*, 159 N.C.App. 192, 582 S.E.2d 669 (2003), a Nash County case, Plaintiff offered the expert opinion of Dr. Melvin Heiman, an orthopedic surgeon from Virginia who testified that he was familiar with the standard of care in Tarboro and Rocky Mount. Dr. Heiman said, among other things, that he had taken steps to become familiar with these communities and that he understood "about the approximate size of the community and what goes on there..." *Smith v. Whitmer*, 159 N.C.App. 192, 193, 582 S.E.2d 669, 670.

But Dr. Heiman admitted on cross-examination that the information he obtained concerning the local communities had come from Plaintiff's counsel, that it was not written down anywhere, and that he no longer recalled any of the specifics. Moreover, when he was asked again about the standard of care in the communities in question, Dr. Heiman asserted his belief that the standard was *national*, "regardless of what the medical community in Tarboro, North Carolina might do." *Smith v. Whitmer*, 159 N.C.App. 192, 196-197, 582 S.E.2d 669, 671-673. As a result of this testimony, Dr. Heiman's opinions on the standard of care were excluded.

The National Standard of Care and § 90-21.12

Testimony by medical experts on a "national standard of care" is a hazardous area for the unprepared. Although North Carolina case law allows such testimony, it is subject to several important conditions. The most important caveat is this: If your expert has not taken steps to become familiar with the local community, or refuses to even consider a local standard, he or she will likely be rejected.

Bak v. Cumberland County Hospital System, Inc. 165 N.C.App. 904, 602 S.E.2d 727 (table), decided in 2004, is an unpublished opinion that drives home this point.

Bak was an action brought by a husband and wife after the wife suffered a stroke following her hysterectomy. When defendants moved for summary judgment, Plaintiffs offered the expert testimony of Dr. Ahn, an OB-GYN specialist who practiced at Emory University Medical Center. On direct examination, Dr. Ahn testified that the standard of care had been breached in the treatment of Mrs. Bak.

But on cross-examination, defense counsel elicited the following testimony:

Q: [Defense counsel:] Okay. Now, Dr. Ahn, today you have spoken about standard of care, and you have told Mr. Cooper, the plaintiff's lawyer, that by standard of care you are referring to a national standard of care; is that correct?

A: [Dr. Ahn:] Yes.

Q: And is it also correct that you are not licensed to practice medicine in the state of North Carolina?

A: That's correct.

Q: And you have never practiced in North Carolina because that would be unlawful; is that correct?

A: That's correct.

Q: And you have never been to the Cape Fear Valley Hospital; is that correct?

A: That's correct.

Q: And you have never been to any other medical facility in the state of North Carolina; is that correct?

A: That's correct.

Q: And so when you give your opinions about standard of care, you are making the assumption that the standard of care is the same all over the United States? That there is a national standard of care, correct?

A: That's correct.

Bak v. Cumberland County Hospital System, Inc. 165 N.C.App. 904 602 S.E.2d 727, (unpublished). Since Dr. Ahn's testimony went only to the national standard it was insufficient, said the court, to raise a triable issue of fact as to whether the defendant physician breached the standard of care in Fayetteville.

The *Bak* court noted that more than 20 years ago, in *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E.2d 430 (1984), the court allowed a medical expert to testify that the taking and reporting of vital signs by a nurse was the same in accredited hospitals across the country. But the *Bak* court refused to extend such a standard to a hysterectomy: "[A] hysterectomy is a procedure not of the kind which fits within the narrow exception of procedures so uniform, routine, and uncomplicated, that a national standard of care can be applied." *Bak v. Cumberland County Hospital System, Inc.* 165 N.C.App. 904 602 S.E.2d 727, (unpublished).

Issues involving experts who testify as to a national standard of care have appeared frequently. These cases may be distilled down into a few common principles.

First, and as set forth above, an expert who insists on testifying only as to the national standard of care will likely be rejected, either at the trial court level, or later on appeal (subject to one recent exception, discussed below). If your expert will not testify on a local standard, find another one. See, for example, *Smith v. Whitmer*, 159 N.C.App. 192, 582 S.E.2d 669 (2003) (grant of summary judgment appropriate where plaintiff's expert testified only to a national standard of care).

Second, testimony on the national standard of care is not, in and of itself, fatal to an expert's testimony where such testimony is used in conjunction with other evidence. *Leatherwood v. Ehlinger, MD*, 151 N.C.App. 15, 564 S.E.2d 883 (2002), review denied 357 N.C. 164, 580 S.E.2d 368 (N.C. May 1, 2003); *see also Baynor v. Cook*, 480 S.E.2d 419 (1997), review denied 346 N.C. 275, 487 S.E.2d 537 (N.C. June 5, 1997) (discussion of the national standard of care was allowed but a jury instruction specifically recognizing such a standard was properly rejected).

Leatherwood was a shoulder dystopia case brought in Swain County. The case was filed by a mother who alleged that her obstetrician was negligent in the care and treatment of her child during delivery.

Plaintiff's expert, Dr. Jones, was an OB-GYN licensed to practice medicine in South Carolina and Alabama. At trial, Dr. Jones testified regarding the risks of shoulder dystopia in large babies, the impact of gestational diabetes on growth rates, and on the proper methods for delivery of a large baby to minimize injury to the infant. Among other things, Dr. Jones also used an anatomical model to demonstrate the proper method of delivery in these types of cases. The trial judge granted a directed verdict for the defendant after finding that Dr. Jones was not qualified under § 90-21.12.

Plaintiffs appealed the directed verdict on several grounds, including the court's decision that Dr. Jones was not qualified under § 90-21.12. In opposition, the defendant contended "Dr. Jones' testimony related only to a national standard of care which is not permitted under N.C. Gen.Stat. § 90-21.12." *Leatherwood v. Ehlinger, MD*, 151 N.C.App. 15, 21-22, 564 S.E.2d 883, 888-889. In support of this argument, Defendant cited *Henry v. Southeastern OB-GYN Associates, PA.* discussed infra, decided in 2001. (In *Henry*, testimony on the national standard was deemed insufficient where the expert could not link the national standard to the local community.)

But the court of appeals didn't see it that way. In reversing the trial judge's directed verdict, the appellate court distinguished *Henry* on its facts:

> In contrast with the expert in *Henry*, Dr. Jones specifically testified that he had "[k]nowledge of the standards of practice among obstetricians with similar training and experience as that of [defendant] in Asheville and similar communities [at the time of Amelia's injury] with regard to the appropriate management of shoulder dystopia in delivering children." Additionally, he testified that, as a medical student, he attended rounds at the hospital

in which Amelia was delivered. Further, the record shows that Dr. Jones practices in Greenville, South Carolina, and has practiced in similar communities in Alabama and Mississippi, which are similar in size to Asheville. **Finally, he specifically testified that "Asheville and other communities that size practice the same national standards" with respect to the management of shoulder dystopia.**

Leatherwood v. Ehlinger, MD, 151 N.C.App. 15, 22, 564 S.E.2d 883, 888.

A similar result was reached two years ago in *Cox v. Steffes, MD et al*, 161 N.C.App. 237, 587 S.E.2d 908 (2003), review denied 358 N.C. 233, 595 S.E.2d 148 (N.C. April 1, 2004).

Cox was a malpractice action following a surgery to correct a stomach acid reflux problem. The jury found for the plaintiff, but the court granted JNOV, based primarily on the trial judge's finding that the expert for Plaintiff was not qualified to testify on the standard of care in Fayetteville "or similar communities."

Plaintiff's expert was Joseph Donnelly, MD, a board-certified general and thoracic surgeon who was then retired. It is not entirely clear, but it appears from the appellate court opinion that Dr. Donnelly had extensive experience in performing the surgery at issue in *Cox*. Dr. Donnelly was apparently licensed in Pennsylvania.

The record revealed that Dr. Donnelly practiced in a similar size community in Pennsylvania and that he had been provided materials by Plaintiff's counsel about the local community in North Carolina and the Level 2 hospital where the surgery took place. Dr. Donnelly testified "Reading [Pennsylvania] was similar to Fayetteville with respect to board-certified physicians, sophisticated lab services, x-ray departments, anesthesia services, hospital certification, and access to specialists." *Cox v. Steffes, MD et al*, 161 N.C.App. 237, 244-245, 587 S.E.2d 908, 913. But this was not enough.

The appellate court reversed. The court of appeals looked not just to the testimony of Dr. Donnelly, but also to the testimony of the defendant's expert, Dr. McGuire, to find that the standard of care in Fayetteville was the same as everywhere else in the country, and that the trial judge had erred:

> Equally important, Dr. McGuire [the defense expert] testified that the standard of care at issue in this case was in fact the same across the nation. As to post-operative care, Dr. McGuire first testified, "I think it is the universally accepted standard of care." He then agreed more specifically that with respect to post-operative care "the standard of care applicable for that would be the same across the US in 1994 for any board-certified surgeon."

Cox v. Steffes, M.D. et al, 161 N.C.App. 237, 244, 587 S.E.2d 908, 913.

The appellate court also said that Dr. Donnelly was probably qualified to testify based solely on his review of the record and his knowledge of Fayetteville, but added that, "even if this testimony is disregarded, Dr. McGuire's testimony established that the standard of care with respect to post-operative care by board-certified general surgeons, under the circumstances of this case, is the same for all communities." The lesson here: If both experts agree that the standard of care is national, then it is acceptable, per *Cox*.

Is there a Statewide Standard of Care?

Is it enough for your expert to say that he or she is familiar with a statewide standard of care in North Carolina?

The answer to this questions is no. The fact that an expert witness testifies that are generally familiar with the standard of practice in North Carolina is not enough to meet the burden established by the statute. The expert must be able to testify that are familiar with "the same or similar communities" where the defendant practiced medicine.

This issue has also caused problems for counsel in recent years.

For example, in *Tucker v. Meiss*, 127 N.C.App. 197, 487 S.E.2d 827 (1997), the appellate court affirmed a directed verdict in favor of the defendant physician, even though the plaintiff's expert testified that he was familiar with the standard of care in North Carolina.

In *Tucker*, a case out of Iredell County, Plaintiff and her husband sought to recover for an allegedly negligent episiotomy in Winston-Salem. Plaintiff's expert, Dr. Tasker, testified that although he was an OB-GYN licensed in Tennessee, he was quite familiar with the standard of practice for OB-GYNs who performed episiotomies in North Carolina. What he did not say, according to the appellate court, was that he was specifically familiar with the standards of practice in Winston-Salem. As such, his testimony was precluded, and Plaintiffs were left without their standard of care expert. *Tucker v. Meiss*, 127 N.C.App. 197, 198-199, 487 S.E.2d 827, 828-829.

A similar result was reached again four years later in *Henry v. Southeastern OB-GYN Associates, PA*, 145 N.C.App. 208, 555 S.E.2d 245 (2001), affirmed 354 N.C. 570, 557 S.E.2d 530 (N.C. Dec. 18, 2001), a case out of New Hanover County that also resulted in a directed verdict for the defense.

Henry was a shoulder dystopia case brought by the parents of an infant to recover for allegedly negligent care rendered in Wilmington. Plaintiffs retained Dr. Chauhan of Spartanburg as their expert. Dr. Chauhan testified that he was familiar with standards of practice at both Duke and Chapel Hill. He also said that the standard of care was the same in all three communities—Spartanburg, Duke, and Chapel Hill. Therefore, Plaintiff argued, Dr. Chauhan met the "similar communities" requirement imposed by the statute.

The trial judge, and later the appellate court, disagreed. "Even if Dr. Chauhan was familiar with the standard of care in Chapel Hill or Durham," observed the court, "there was no evidence that a similar standard of care prevailed in Wilmington." The directed verdict was affirmed. *Henry v. Southeastern OB-GYN Associates, PA*, 145 N.C. App. 208, 211-213, 550 S.E.2d 245, 247-248 (the court also rejected testimony from Plaintiff's expert that a national standard of care applied in shoulder dystopia cases). For an even more recent case on this issue, see *Ramirez v. Little, MD*. 609 S.E.2d 499 (Table-unpublished), 2005 WL 465525 (N.C.App. March 2005).

What About Other States?

What if your expert in North Carolina is seeking to testify as to the standard of care in another state? Does the expert have to testify as to the "same or similar community" of the foreign jurisdiction?

The answer to that question is yes, at least where the underlying action is brought here.

In *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 535 S.E.2d 55 (2000), the appellate court noted that it would be necessary for a North Carolina pharmacist, testifying against a pharmacist in South Carolina, to otherwise qualify under the "same or similar communities" rule of § 90-21.12. This meant that in *Brooks*, the experts would have to be familiar with the standards of practice in Greenville, South Carolina, even though the action was filed in North Carolina. *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 652-

657, 535 S.E.2d 55, 65-67.

The *Brooks* case also provides some important, albeit confusing, lessons in preserving issues related to § 90-21.12 for appeal.

In *Brooks*, Plaintiff alleged that his physician was negligent in writing a prescription, and that a Wal-Mart store pharmacist was negligent for filling the prescription. The prescription was filled in Wal-Mart's Greenville, South Carolina, store. The physician and the store, apparently happy to do the work for Plaintiff's counsel, in turn sued each other. The Guilford County jury which heard the case returned a verdict for $2.5 million in compensatory damages and $1 in punitive damages against Wal-Mart, which subsequently brought an appeal on more than 33 different issues, including the claim that an expert at trial was not qualified to testify under § 90-21.12.

Plaintiff's expert was Joseph Burton, a pharmacist who maintained a practice in Greensboro, North Carolina. The gist of Dr. Burton's testimony was that Wal-Mart's pharmacist had failed to adhere to the standard of care in filling a prescription of Prednisone, that was too high. Wal-Mart maintained that Burton was not competent to testify as to the standard of practice in Greenville because his testimony "revealed a total dearth of knowledge or familiarity with the practice of pharmacy in that community." *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 654, 535 S.E.2d 55, 65.

Although Burton testified summarily that he believed he was familiar with the appropriate standard, he pretty much admitted on cross-examination that the standard to which he was referring was a national one. There was no testimony that he had ever practiced in Greenville, that he had done any independent research on that community, or that he had been provided with any information on the city or its pharmacy community by counsel. Observed the court:

> Burton also admitted he was not familiar with South Carolina Statutes or administrative regulations governing the practice of pharmacy, that he had not attended any seminars discussing such statutes or regulations, and that he had not discussed the instant case with any South Carolina pharmacist.

Brooks v. Wal-Mart Stores, 139 N.C.App. 637, 656, 535 S.E.2d 55, 67.

Nonetheless, the testimony was allowed to stand. The appellate court held that Wal-Mart had waived its objections to Burton's testimony by several actions.

First, said the court, Wal-Mart initially interposed no objection to the tender by Plaintiff of Burton as "an expert in the field of pharmacy." The court noted that Wal-Mart should have objected and requested an Evidence Code § 705 hearing to conduct voir dire before the expert was offered to the jury.

To make matters worse, continued the court, Wal-Mart failed to move to strike (following its objection) Burton's testimony on the standard of care and therefore waived its objection.

Finally, said the court, Wal-Mart waived any benefit of its earlier objections to the testimony of Burton when defense counsel proceeded to cross-examine the expert and thereby elicited the same testimony that was proffered on direct. *Brooks v. Wal-Mart Stores*, 139 N.C.App. 637, 656, 535 S.E.2d 55, 67.

It is hard to fault defense counsel for proceeding on cross-examination (wherein counsel effectively proved that the expert was not

qualified under § 90-21.12) when the trial judge has overruled counsel's previous objections. In this sense, *Brooks* is a rather confusing opinion. Still, the case should be a warning, and a possible road map, for future actions in which experts are challenged and how to best accomplish that task during trial.

The National Standard Allowed?

Are there any situations in which an expert can be totally oblivious to the local community and still be accepted as an expert on the standard of care?

Well, maybe.

One example is found in *Marley v. Graper*, 135 N.C.App. 423, 521 S.E.2d 129 (1999), cert. denied, 351 N.C. 358, 549 S.E.2d 214 (N.C. Feb. 3, 2000), a case that at first glance seems to run contrary to decisions both before and after 1999.

Marley was a malpractice action brought by a patient and her husband alleging negligence in connection with a surgery performed at a hospital in Greensboro. Following surgery, the patient experienced memory loss, confusion, hallucinations, and vision impairment. The patient was ultimately diagnosed with optic neuropathy, a condition caused by decreased blood flow to the end of the optic nerve, leading to tissue death. *Marley v. Graper*, 135 N.C.App. 423, 425, 521 S.E.2d 129, 131-132.

The *Marley* case went to trial in Mecklenburg County. The jury returned a defense verdict. On appeal of the verdict, Plaintiff contended, among other things, that the trial judge had erred in admitting the videotaped testimony of a defense expert who, according to the appellate opinion, "did not testify that he was familiar with the standard of care for Greensboro." *Marley v. Graper*, 135 N.C.App. 423, 430, 521 S.E.2d 129,134-135. What the expert did say, however, was that the defendant met *any* standard of care.

The appellate court observed that the videotaped testimony of the expert "obviated the need" for familiarity with the local community standards. "If the standard of care for Greensboro matched the highest standard in the country," said the court, "Graper's treatment of Marley met that standard." If the standard of practicing medicine was lower in Greensboro, continued the court, then the treatment of the plaintiff exceeded the area standard. Either way, the requirements of § 90-21.12 were met.

The *Marley* decision is best suited to defense experts in a malpractice trial. As long as the expert testifies that the defendant met the highest standard of care found anywhere, the testimony comes in. However, the reverse is not true: an expert retained by the plaintiff could not testify that the defendant breached the standard of care anywhere—that expert would still have to testify as to the standard of practice that existed in the same or similar community at the time the treatment was rendered.

Getting Your Expert Qualified

What can be distilled from all of these opinions, and how should counsel best approach the task of getting their expert qualified?

First, keep a close watch on advance sheets from the court of appeals—both the published and unpublished decisions. These cases are common, and they appear to be reaching the appellate court on a regular basis. Even where the opinion is unpublished, the fact patterns involving § 90-21.12 issues can provide guidance for you as you prepare your own experts for trial.

Second, be careful with any expert who insists that the standard of care in your case is the same everywhere—that the standard is a national one. Your expert may very well be correct, but that will be of no benefit to you at trial if the court insists on requiring the expert to make the link to the "same or similar communities" involved in your case. If you cannot get your expert to understand the requirements of § 90-21.12, find another expert.

On a related question, even if you represent the defendant physician and your expert is ready to state that your client met the "highest standard of care that there is," as in the *Marley* case, be prepared to have a backup plan. There is just too much uncertainty in these cases to have your entire case depend on an expert who cannot make the local link.

Next, do not assume anything—always a good rule for lawyers. If you find an expert here in North Carolina, find out what he knows about the local community in which the alleged malpractice took place. Has he ever practiced there? Does he know any other doctors there? Did he do his internship or residency there? Does he ever take referrals from that community? Remember, just because your expert is familiar with the standard of care in North Carolina, does not mean that he will be allowed to testify in each and every county here.

There are no cases in which an out-of-state expert is precluded from testifying simply because he does not practice here. What lands lawyers in trouble are experts who know nothing about the local community.

If the expert has no ties here, educate him, and also instruct him to do a little research on his own: What type of hospital is there? What are the facilities? What kind of medical community is it? Where is it (this is especially important for out-of-state experts who know nothing about North Carolina), and the like. Internet research is available for your expert (as in the *Coffman* case) and your own local contacts can provide information for your expert on the medical community.

If you are representing the defendant, do not forget that your own client may have a wealth of information about the local medical community that can be passed on, through you, to your expert.

For either side, once your expert knows more about the community, he or she may be able to compare it directly to a similar size community once practiced in—or that he or she practices in now.

If you are challenging an expert, consider doing so pursuant to Evidence Code § 705 outside the presence of the jury. If you have already deposed the expert, you should have a pretty good idea prior to trial as to whether or not you can make a good case that he or she be precluded pursuant to § 90-21.12. And if the court overrules your challenge, keep in mind the requirements for preserving your challenge on appeal.

Most medical malpractice cases require your expert to spend several hours, at least, in review of the file to prepare for a deposition. Many cases require much more preparation. So do not fret over asking your expert to spend another hour or two educating himself about the local community. If he does not, then all the rest of the time for which you are billed may be a useless (for you and your client) academic exercise. ■

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AL8419

Pork on the Prairie

By Wayland Cooke

We didn't make this trip with the idea of writing about it. But when Steve Crihfield, one of our State Bar Councilors, heard about it, he urged that we produce an account of the venture because "...people need to read about lawyers doing enjoyable things, not just about legal matters." Steve has long been involved in attorneys' quality of life issues such as the secured leave program and thought the story of this trip would be a pleasant change of pace for the *Journal.*

Greg Brooks and the author at a rest stop in Iowa.

It all started when I learned Garrison Keillor's public radio show "A Prairie Home Companion" would be broadcasting from the Corn Palace in Mitchell, South Dakota. This serendipitous juxtaposition was too good to pass up so I mentioned it to Kevin Morse, friend, fellow attorney, and afficionado of the show as well as the Corn Palace. Kevin and Greg Brooks, a local sleuth, are the Pig Masters—they cook whole pigs eastern North Carolina style over hickory coals for various events. We convinced Greg and my law partner, Davis North, that "Pork on the Prairie" would be an interesting journey.

The idea was to cook a pig for the cast and crew of A Prairie Home Companion in connection with their appearance at the Corn Palace. I wrote to Garrison Keillor extolling the virtues of the Pig Masters and offering to provide a meal for him and his entourage. Katrina Cicala, his assistant, called to accept our offer and we began planning the details.

Davis North and I met over a poker table in Chapel Hill in the late 60's. We later both worked as assistant public defenders for Wally Harrelson in Greensboro and have practiced primarily criminal law together since 1983. We have taken several lengthy road trips with friends and this looked like a good opportunity for another.

Kevin Morse also practices criminal law in Greensboro. He is married to Kathleen O'Connell, an attractive and somewhat flamboyant assistant district attorney here. I knew Kevin enjoyed driving, road trips, and had visited the Corn Palace years back. He imme-

Dinnertime at the Corn Palace (above), the Pig Rig at the Gateway Arch (right), the Pigmasters with the Showfolk. From left, Wayland Cooke, Amanda Barrett, Davis North, Garrison Keillor, Abby DeWald, Greg Brooks and Kevin Morse. Abby and Amanda are the Ditty Bops (below).

diately recognized the merit of the idea.

Greg Brooks is an ex-policeman, formerly head of security at Guilford Mills, presently a private investigator and full-time philosopher. We have learned never to bring up the Kennedy assassination around him unless there's about two hours to kill. Besides needing his skills as one of the Pig Masters, we brought him along to do the heavy thinking and PR work.

Kevin and Greg have a 14 foot enclosed trailer, the "Pig Rig," with a back door that drops to make a ramp. There are kitchen cabinets built in, a CD stereo, and plasma TV with dish. It holds a pig cooker made from a 275 gallon oil tank, a keg refrigerator, a 55-gallon drum burn barrel, two canopy tents, several tables, and a large tub for transporting the pig.

The Red Oak Brewery in Greensboro donated a keg of its amber beer and our local Cheerwine distributor contributed three cases of his finest vintage. We were intent on making some southern cuisine available to those who might otherwise be deprived. In that vein, we procured two cases of Moon Pies and prepared to haul pig.

The Corn Palace rises majestically from the rolling plains of South Dakota in the town of Mitchell (population 14,588), home of George McGovern. It is designed as a theater with a basketball court just in front of the stage. The Mitchell High School basketball team, The Kernels, plays there and won the South Dakota state championship this year. The place attracts tourists in bushels to see the large murals done in a mosaic style made of corn, grasses and grains grown locally. These huge murals adorn the outside of the building and are replaced annually with a different theme portrayed every year. This has been going on since 1892. The combination of this great building plus A Prairie Home Companion beckoned us westward.

We split and loaded a quarter cord of hickory wood into the bed of Kevin's Dodge Hemi truck and he, Greg, and I left early on Wednesday morning. We were to pick up Davis at the Omaha airport Thursday afternoon. The Pig Rig attracted plenty of interest at gas stops (and there were an abundance of those). After we explained our trip to a kid running a service station in Tennessee, he refused to let us pay for the fresh bags of ice we'd put on the pig. We kept about 30 bags of ice under and on top of the pig during its voyage west. We got into St. Louis before dark and photographed the Pig Rig under the Gateway Arch on the banks of the Mississippi River. The parking staff at the Radisson saw the Pig Rig, thought we were

The eighth wonder of the world - the Corn Palace, Mitchell, South Dakota (right), Cooke and Brooks in Hannibal, MO (below right), the Pig Rig at Churchill Downs, Louisville, KY (below left).

carrying barbeque ready for eating, and provided space for the truck and trailer at their front door. We had a great dinner at Charley Gitto's, an Italian restaurant about two blocks from the courthouse where the Dred Scott decision was handed down. We closed down the hotel bar while engaging in a multi-topic discussion no one cared to recall in the morning, particularly our PR man, Greg.

Thursday morning we made the obligatory stop in Brunswick, Missouri, to visit the WORLD'S LARGEST PECAN.(Lewis and Clark Journals, Vol. III "...a nutte of greate sizze.") This 12,000 pound beauty sits proudly adjacent to Highway 24 close by a James Hican tree. That tree was developed by George James in 1976 and yields nuts that look like pecans on steroids—part pecan, part hickory. They will ship you a tree for $21.95 (nuthut@mcmsvs.com).

We then visited the house in St. Joseph, Missouri, where Robert Ford shot Jesse James in the back of the head. Jesse was straightening a picture on the wall at the time. He should have left interior decorating to his wife. After paying our respects, we headed up the Big Muddy to pick up Davis at the airport in Omaha, which is actually in Carter Lake, Iowa, even though it's west of the Missouri River and all the rest of Iowa is east of the river. It looks like a situation ripe for a riparian rights controversy with some accretion law thrown in.

We proceeded on up the Missouri to Mitchell where we were met by Mark Schilling, director of the Corn Palace. He was there at 9:00 pm Thursday to point out where we should set up Friday, and was there at 8:30 am Sunday when we were leaving town. He is earning his pay. Mark was very helpful and genuinely nice as were all the folks we encountered in Mitchell.

At 6:30 Friday morning we lit the fire barrel to start producing coals, and put the pig on the cooker at 7:00. We set up two canopy tents, put out some tasteful outdoor carpeting, and purchased hanging plants and palm trees to spiff up the decor at the trailer. After plugging into municipal power at City Hall adjacent to the Corn Palace, we cranked up the Allman Brothers, adding to the ambiance. The plan was to serve dinner to the cast and crew of A Prairie Home Companion, employees of the Corn Palace, and folks from South Dakota Public Radio after the rehearsal that evening.

A Prairie Home Companion is a two hour radio show carried live on public broadcasting at 6:00 pm eastern time on Saturdays with a rebroadcast on Sunday. Garrison Keillor is the host and moving force. He is joined by actress Sue Scott, actors Tim Russell and Fred Newman, who is also the sound effects maestro, and the

Guys' All Star Shoe Band headed by Rich Dworsky. The guests for the week were Prudence Johnson, an accomplished singer, the Ditty Bops, two female musicians from California, and George McGovern, former US senator and the Democratic presidential candidate defeated by Richard Nixon in 1972.

Our menu was headlined by a 91-pound pig who hailed from Pikeville, NC. He was a hardy road tripper and made the 1520 mile trip without a squeal of complaint. We soaked a bunch of red potatoes overnight in water, garlic powder, and onion powder, and prepared a huge pot of green beans with side meat. It was Fred Newman's birthday and Sue Scott brought us a cake to serve up for dessert along with the *tarts de lune.*

Downtown Mitchell was soon permeated with the aroma of hickory smoke and pig and lots of people stopped by looking to purchase a barbeque sandwich. These included two gentlemen from Fayetteville who professed to cook pigs themselves and recognized the bouquet from blocks away. A young attorney from Mitchell, Doug Dailey, dropped by at lunchtime, had a couple of Red Oaks, and discussed South Dakota law with us. We invited him to come for dinner and he did along with his parents who are big fans of Garrison Keillor and the show.

I had written to Alice Claggett, mayor of Mitchell, and invited her and the aldermen to join us for dinner. Alice first stopped by around 9:00 am on the way into her office. It was love at first sight. Alice is 78 years old and an absolute pistol. She speaks her mind and has a great sense of humor. She is a splendid ambassador for Mitchell and the town is blessed to have her. She enjoyed the Red Oak and granted us an informal dispensation to partake of it on city property.

Harold Campbell, reporter for the *Mitchell Daily Republic,* caught a whiff of the pungent pork and dropped by. He took photographs and wrote a story which included us for the Saturday edition. Needless to say, we wined and dined Harold in great style. We sent a large portion of barbeque back to the newsroom with him. He was pleased to quote Greg's explanation about our motivation for making the trip.

At 7:30 pm the rehearsal was over and about 40 hungry folks descended on us. Musicians and actors like to eat. These people went through the pig and side dishes like Sherman through Georgia. They ate everything but the squeal. Garrison Keillor devoured two large plates of barbeque and washed them down with Cheerwine. Fred Newman is from southern Georgia and a confirmed vegetarian except for barbeque. He swore this was the best pig he had ever encountered. The Ditty Bops, Amanda and Abby, are also vegetarians but loved the green beans. (We neglected to tell them about the side meat.) Many diners ended up pulling pork directly from the pig on the cooker. The Red Oak beer was enthusiastically enjoyed.

The Pig Rig ready for some fast laps at Indianapolis Motor Speedway.

As the show's entourage numbers about 25, they rarely eat and socialize as a group. Deb Beck, Keillor's logistics and road manager, said the group appreciated the opportunity to get together, eat, and talk. Several of the cast members autographed the Pig Rig including Keillor who penned an impromptu poem on the side door. After the meal we adjourned to the Holiday Inn lounge to continue socializing with the cast and crew.

Saturday morning we scrubbed all our equipment and packed the Pig Rig. Garrison Keillor showed us around backstage and we donned earphones to listen to the musicians rehearse. Keillor was wearing a red "McGovern" button we had given him which matched his red tennis shoes. He is a fellow of few words but was very generous of his time with us.

We had great seats for the live broadcast Saturday and the show confirmed for us how talented these people are. Fred Newman can make a zillion different sounds using only his mouth. Sue Scott and Tim Russell were a joy to watch. The music was great. As the show was on May 7, most of the songs had a Mother's Day theme. George McGovern did a guest appearance on the "Lives of the Cowboys" segment and, for an 82-year-old gentlemen, did a great job with an awkward script. Garrison Keillor's weekly soliloquy, the "News from Lake Woebegon" was unscripted and apparently off-the-cuff. Kevin noted, and we agreed, having seen the show done live, we'd never listen to it the same way again.

Early Sunday we stopped by the Corn Palace on the way out of town. Mark Schilling was on the job and Mayor Clagget drove by while we were parked out front. Bev Robinson, one of the aldermen, had joined us for dinner and she and her husband gave us gift bags full of South Dakota products. As I said, all the people we met in Mitchell, including the showfolk, were as nice and pleasant as could be.

On the trip back to Greensboro we photographed the Pig Rig at Indianapolis Motor Speedway and Churchill Downs. We covered almost 3200 miles, met some wonderful people, and had a great time. A Prairie Home Companion and the Corn Palace make a special couple and we were lucky to be at the wedding. ■

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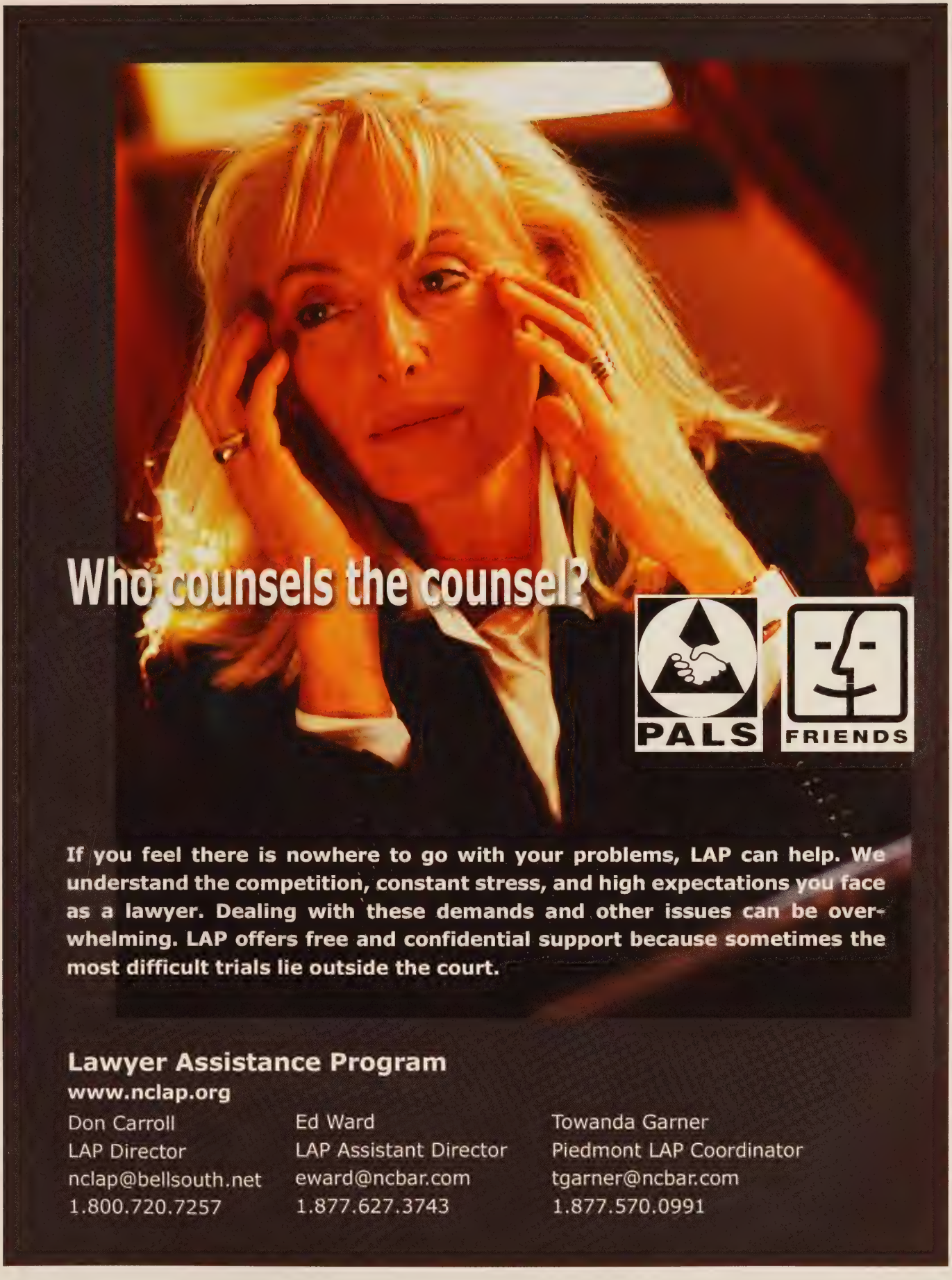
Do You Want to Be a College Professor?

By John Winn

Tired of grinding out 2,000 billable hours per year? Would you consider a career change that lets you spend more time with your spouse and children? How about a job that gives you time off for holidays plus summers, with pay? Would you consider a profession that allows you to make a positive impact on others by instilling respect for the rule of law? On the other hand, can you accept a significant decrease in salary, a lesser pension, or a requirement that you move to a new state to practice your craft?

More than a few weary and worn mid-career lawyers consider the possibility of teaching full or part-time in a college or non-law graduate degree program. Why not teach law school? If you believe you would be competitive for a law school teaching position, that might be a first choice, but few of us have the background or experience to be competitive for a teaching position at a law school.[1] On the other hand, although salaries tend to be lower[2] than law school salaries, there are other advantages to teaching outside law schools. These include the freedom to independently develop courses without necessarily focusing on current jurisprudence (or the bar exam); discussing the law with young people; and mentoring students in the legal and ethical responsibil-



If you feel there is nowhere to go with your problems, LAP can help. We understand the competition, constant stress, and high expectations you face as a lawyer. Dealing with these demands and other issues can be overwhelming. LAP offers free and confidential support because sometimes the most difficult trials lie outside the court.

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"Another obstacle you may encounter is what may be termed the 'Ph.D. thing.' While your Juris Doctorate (JD) is a doctoral degree, there are institutional and cultural biases against lawyers in academia."

ities of citizenship. If you believe you have a real desire to teach, there is no reason not to at least explore the possibilities, while remaining aware of the drawbacks.

I. Qualifications of a College Professor

Once you decide that teaching is something you wish to pursue, there are hurdles the legally trained jobseeker must confront. The first of these hurdles is teaching experience. There is a maxim that states "the best way to get a teaching job is to be in a teaching job to begin with." In other words, academic search committees place a great deal of emphasis on experience.

Education is a commodity and tuition-paying students have the right to expect a certain minimum level of teaching ability. Hiring an untested teacher is a gamble most institutions cannot afford. Prior experience teaching, even in an adjunct position at a local community college or night school program will open doors for full-time employment. Adjunct teaching is an ideal "entry level" position for lawyers to gain a foothold into academics.

In this respect, if you have the opportunity to teach a law-related course as an adjunct, it should be your highest professional priority. Your students deserve a superior academic experience. Poor preparation, tardiness, absences, or lack of respect towards your students will yield unfavorable term-end feedback and marginal teaching evaluations. Being an adjunct is a great way to hone teaching skills and accumulate needed experience.

Another obstacle you may encounter is what may be termed the "Ph.D. thing." While your Juris Doctorate (JD) is a doctoral degree, there are institutional and cultural biases against lawyers in academia.[3] This bias exists despite the fact that a JD requires a comparable number of credit hours of study[4] (plus a bar exam). On the other hand, a Ph.D. often takes longer to complete because a dissertation[5] is required. While law courses might be more rigorous than some Ph.D. courses, professors tend to view the Ph.D. as superior to the JD because of the added research component in the Ph.D. Lawyers applying for non-law teaching positions will have to understand the world of Ph.D. academics as well as they understand the legal environment.

There are also issues of accreditation that some schools may wrestle with when considering whether to hire a JD over a Ph.D. College and masters degree programs fall under both regional[6] and program-based[7] or specialized accreditation agencies. Most accreditation agencies will recognize the JD as an acceptable terminal degree if the applicant's file demonstrates a commitment to research, teaching, or service in that particular field.[8] Nevertheless, having an additional post-graduate degree of any kind (MS, MA, MBA, or LLM) is a significant advantage if you don't possess a Ph.D. Another option is to enroll in a Ph.D. program part-time or via an accredited distance learning (internet-based) degree program.[9]

II. Available Positions and Successful Applications

After deciding that you might wish to pursue an academic position, it is important to focus on the two keys to success: (1) finding open academic positions; and (2) creating a marketable curriculum vitae (CV).[10] You must bear in mind that there are more legal jobs than professorial jobs as there are more law firms than colleges. For some academic positions, English or History for example, there may be hundreds of Ph.D.-qualified candidates seeking a single position. This means that lawyers must determine what teaching niche they might occupy and probably be willing to relocate as well.

For planning purposes, the normal academic hiring season begins with job announcements in late fall, a review of applications during the holiday season, and concludes with campus visits in the early spring for positions in the fall semester. Thanks to the internet, finding available jobs is fairly easy. Most teaching solicitations will indicate whether or not initial letters of interest and CVs may be sent via e-mail.[11] It may be worthwhile to mention here that unsolicited mailings to schools not advertising any open positions are unlikely to yield any positive responses.

Two job information sources of great benefit are The Chronicle of Higher Education's "Careers Online"[12] website and the American Society of Criminology's "Employment Exchange."[13] Chronicle Careers lists thousands of teaching positions by discipline, state, region, and institution. Chronicle Careers also has specific listings for "law and legal studies" which includes potential teaching positions in law-related fields. Law-related areas include paralegal studies, labor relations, law enforcement, criminal justice, criminology, homeland security, management of criminal justice agencies, forensic science, debating, government, international relations, and, of course, political science.

Most (if not all) of the positions listed in the alternative Employment Exchange specify that a Ph.D. in sociology, criminology, or related field is required. Nevertheless, if teaching responsibilities include criminal law, courts, terrorism, law enforcement,[14] evidence,[15] juvenile justice, corrections, conflict resolution, white-collar crime, or homeland security, a JD with experience in these fields might persuade a search committee[16] to consider a strong non-Ph.D. candidate.

III. Developing Your Curriculum Vitae

While similar in many ways to a resume, the curriculum vitae ("CV") focuses primarily upon three academic domains: teaching, research (i.e. scholarship), and service. In this context, a curriculum vitae should be longer (2-3 pages or more) and more detailed than a resume. While work experience is important, the CV should focus on education, teaching, publications, lectures,

awards, honors, and professional affiliations.

Don't forget to list continuing legal education (CLE) courses, especially those at which you have taught or lectured. You should expect to draft slightly different versions of your CV for each position in which you are interested. For example, a CV prepared for an undergraduate business law position will be different than one prepared in response to an assignment teaching political science or criminal justice at a community college.

A carefully drafted cover letter for your CV is also important. The cover letter is what may persuade search committee members to look at your CV. After referencing the position for which you are applying, start with your strongest qualification. "I have four years of graduate and undergraduate teaching experience as an adjunct faculty member at East Westchester County Community College." If the position announcement specifies a Ph.D., focus your cover letter on actual knowledge and skills in the field. "In addition to my teaching, I have substantial experience and training in most of the fields referenced in your position description."

If members of the search committee haven't considered that an experienced lawyer may be a better choice to teach government, labor relations, or criminal justice, this is your opportunity to make your case. Often, the Ph.D. will be a minimum requirement, especially at more prestigious colleges, but even they might have a need for a JD. For example, a school of education within a university will usually hire only Ph.D. professors, but the school might have a need for a lawyer/professor to teach the courses pertaining to educational law, which involves federal and state constitutions and statutes.

Another document that is usually expected with a cover letter and CV is a "statement of teaching philosophy." The statement of teaching philosophy should not exceed a page in length. It simply articulates your vision of the learning process and what you seek to achieve in the classroom. Frankly, it probably also functions primarily as a screening tool to weed out applicants who can't write, use bad grammar, or don't proofread.

My statement of teaching philosophy included references to active listening and positive reinforcement, but focused primarily on my use of digital imagery (PowerPoint[17]) in the classroom to appeal to visual and abstract learners. I ended the statement by mentioning my most important goals in the classroom, instilling respect for the rule of law and ethical decision making. There is a wealth of useful information online on how to prepare effective statements of teaching philosophy.[18] At a minimum, make sure you ask someone to review your statement to ensure it is reasonably articulate and free of typos.

IV. Completing the Application Process

The final component of your packet will be letters of recommendation and transcripts. Most schools will accept photocopied college and law school transcripts, while others may request official sealed transcripts. You should expect to be asked for a minimum of three letters of recommendation. If you have adjunct experience, letters from your department head or other faculty

"You will probably also begin to receive a good number of polite rejection letters. Don't let this discourage you. Remember, as a JD, you are looking for a teaching department with open-minded faculty willing to consider your application despite perceptions you may lack traditional academic qualifications."

will probably be of greater value than letters from local judges, the mayor, or your senior partner. If you have been involved in community service, charitable activities, or perhaps a pro se program, letters regarding this service should be included.

Letters should emphasize your teaching experience, popularity with students, and ability to get along well with other people. Search committees are not necessarily looking for the "best teacher." They are looking for well-qualified candidates that will fit in and contribute to their departments without problems. A "good colleague" is usually better than a great instructor who does not get along with others.

With luck and patience, you should start receiving routine letters from schools seeking voluntary disclosure of your racial, ethnic, veterans, or handicap status. These form letters often come from university or college affirmative action offices. I filled them in and returned them, for no other reason than to avoid any possible ripple effects of not sending in the form. Another colleague advised me to throw them in the trash. If you are a minority or female, I think this information would certainly be in your best interests to provide.[19]

You will probably also begin to receive a good number of polite rejection letters. Don't let this discourage you. Remember, as a JD, you are looking for a teaching department with open-minded faculty willing to consider your application despite perceptions you may lack traditional academic qualifications. Even well qualified Ph.D. candidates normally do not expect more than a handful of positive responses from among the dozens of applications submitted.

V. Interviewing and Campus Visits

With some luck, however, the next step may be a friendly phone call from the chairperson of the search committee, or the departmental chair, who will arrange for a phone interview (conference call) with the members of the faculty search committee. Phone interviews may be the most important step in the hiring process. A request for a phone interview means that you (and probably several other candidates) are qualified for the job.

The search committee wants to find out in the phone interview if you will fit in as a teacher and colleague. To prepare, you may write out a list of questions with answers to the usual areas of inquiry. Why do you want to teach? Where do you see yourself in five years? What would you bring that is unique to this school or to the department? Are you willing to relocate with your family to a distant state? Every phone interview is different. Some committees focus on classroom experience, others on scholarship or curriculum development. Another committee may utilize a set of numbered questions with graded responses for each candidate. It is certainly helpful, and probably even expected of you, to ask the initial point of contact about the format of the phone interview in advance.

When preparing for the phone interview, it is essential to research the department, curriculum, and school. The easiest way to do this is to peruse the college or university website. Write down names of all faculty members and review their backgrounds and qualifications. Become familiar with the courses and think about how you would teach them effectively. Review the school's vision statement. Be ready to respond to questions about accreditation and whether you would serve on committees. Things like your community service can also be of interest to the committee.

If you don't familiarize yourself with the school and program in advance, your chances of moving past the phone interview will be seriously diminished. Remember, be yourself, listen carefully to the questions, don't interrupt, and ask for clarification if necessary. Be candid about apparent or perceived weaknesses in your application. Make sure you emphasize what you can bring to a program that other applicants cannot.

If the phone interview goes well, you can expect to receive an invitation for a campus visit within a few days. This should be great news for you. Invitations to visit campus are normally granted only to the final two qualified candidates. With regard to travel, unless the campus is nearby, you will be reimbursed for airfare, mileage, and other reasonable expenses. Campus visits often last most of the day and involve several meetings, interviews, teaching demonstration, or a presentation of your "current research."[20]

On a visit, you can expect to meet with the department head and other faculty members in the morning, give a teaching demonstration,[21] then a luncheon, followed by a meeting with the dean. While you are on a campus tour in the afternoon, the faculty search committee is probably meeting with the department chair to discuss your candidacy. Do not expect to be offered a job on the spot, although it may happen on occasion. Remember, the other candidate may not have visited campus. Also, despite your bravura performance, formal approval for job offers usually requires approval by the dean and provost. Expect delays in the search process.

Nevertheless, if during your campus visit, your discussions turn toward salary, benefits, and promotion, there is a better than even chance you have been selected for the job. No matter what occurs, when you return home, a follow-up letter of thanks to the department head is an expected courtesy. Even if the other candidate is offered the position, if the other candidate declines, a well-timed letter of thanks will not hurt your candidacy.

If you have been lucky enough to be invited on several campus visits, the most difficult decision you face may involve the timing of contract offers. One week you are waiting for your first offer and the next you may have two offers with short deadlines for acceptance.[22] You may even have campus visits scheduled for subsequent weeks. There are worse dilemmas to be sure, but waiting for the "better offer" from another school is a fairly hazardous option.

Depending upon your qualifications,

there may or may not be an opportunity to negotiate salary, benefits, promotions, tenure, moving expenses, or other considerations. On the other hand, some offers may be limited to take-it-or-leave-it. Whatever occurs, do not be surprised at the brevity of your employment contract. Many, if not most of the terms and conditions of your employment will be found in the school's faculty manual.

VI. Summary

To summarize, maximize your knowledge, skills, and abilities in your cover letter and CV. Don't be discouraged by rejection letters, and apply for as many positions as you can.[23] Finally, be realistic about your own qualifications. Most lawyers would be wasting time by applying for a faculty position at the Kennedy School of Government, but there are thousands of universities, colleges, junior, and community colleges that need qualified faculty every year. Somewhere out there lies an opportunity to teach and mentor outside the courtroom or law office. ■

Professor Winn is an associate professor at the Harry F. Byrd School of Business, Shenandoah University, Winchester, Virginia. He also taught undergraduate law and legal studies at the United States Military Academy (West Point) from 2000-2005 and post-graduate criminal law and trial advocacy in the LLM program at The Judge Advocate General's School (Army) in Charlottesville, Virginia, from 1993-1996. Professor Winn recently retired from active duty with the Army Judge Advocate General's (JAG) Corps.

Endnotes

1. Typically, law school faculty are distinguished graduates of nationally recognized law schools, have served on law review, have experience as legal clerks, or with prestigious law-firms in a major cities.
2. Salaries vary considerably among public and private colleges and by geographic region. A doctoral level assistant professor at a four-year college can expect to make between $50,000-$60,000 per year. Data from Table 4, Average Salary and Average Compensation Levels, by Category, Affiliation, and Academic Rank, 2004-05, American Association of University Professors, Annual Report of the Economic Status of the Profession.
3. At a recent conference for political science professors teaching in college pre-law programs, a lecturer speaking to a colleague (who is a JD) stated in all seriousness that "the law is too important to be taught by lawyers."
4. A Ph.D. requires between 85 and 90 hours of post-graduate credit (which normally includes credits earned towards a masters degree). One third or more of these credits are awarded for writing a dissertation.
5. A dissertation is a lengthy (often a hundred or more pages) writing project based upon original research which demonstrates mastery in the area of study.
6. There are six geographic regions in the United States that accredit college and university higher education programs: The Middle States Association of Colleges and Schools; The New England Association of Schools & Colleges; The North Central Association of Colleges and Schools; The Northwest Association of Schools And Colleges; The Southern Association of Colleges and Schools; and The Western Association of Schools and Colleges.
7. Criminal Justice programs are usually accredited under the auspices of The Academy of Criminal Justice Sciences (ACJS) while MBA programs may seek accreditation from The Association to Advance Collegiate Schools of Business (AACSB).
8. The Academy of Criminal Justice Sciences (ACJS) actually proposed a requirement that two-thirds of the faculty members in an undergraduate degree program and 90% in graduate programs possess a Ph.D. Part I. C. 4 and 5, proposed ACJS Certification Standards, 2004.
9. Before enrolling in a graduate online ("distance learning") program make sure it is properly accredited by an agency accepted by the Council on Higher Education. For more information visit the council's website at: www.chea.org.
10. A curriculum vitae (usually referred to as "CV") literally means "course of life." It is used when applying for academic or scientific positions as opposed to a resume.
11. Most academic institutions use MS Word for this type of correspondence
12. http://chronicle.com/jobs/
13. http://www.asc41.com/dir3/index.html
14. Law enforcement, forensic sciences, and homeland security are currently very popular areas of study in criminal justice programs.
15. Most attorneys are surprised to learn that evidence law is often taught outside of law schools by Ph.D. faculty with no litigation experience. It should be noted, however, that dual degree (JD/Ph.D.) holders are not uncommon in criminal justice programs.
16. Most teaching candidates are screened by faculty search committees of three or more members who propose nominees to the department head or dean for final approval.
17. PowerPoint is a proprietary software program of the Microsoft Corporation for creating classroom and business presentations.
18. One of the better sources for developing your statement of teaching philosophy is the Ohio State University Faculty & TA Development Center website: ftad.osu.edu.
19. Colleges and Universities often have difficulty finding qualified women and minority candidates, especially in scientific and technical fields. See New York Times: Little Advance Is Seen in Ivies' Hiring of Minorities and Women, Karen W. Arenson, March 1, 2005.
20. This usually means your most recent bar journal or law review article. You will probably be expected to be working on some scholarly article or be involved in some other research project. Current research does not have to be a completed law review article, it can be at almost any stage of development.
21. Normally a guest lecture can be on almost any topic, although tailoring your presentation to local course goals would be a plus in your favor.
22. Because of other pending candidacies and academic deadlines, job offers must normally be accepted or declined within seven to ten days.
23. It would not be unusual for even well qualified Ph.D. candidates to apply (by mail or e-mail) to 60 or more colleges and universities and be seriously considered by no more than five or six schools.

Gifts with Powers of Attorney—Are We Giving the Public What It Wants?

By Kate Mewhinney

The word "gift" conjures up a surprise in wrapping paper and ribbon. Unfortunately, when it comes to giving gifts under a power of attorney, often the unhappy surprise is that the gift that is needed cannot be given.

Gift-giving by agents under a power of attorney is important in the context of the federal/state program known as Medicaid, which pays for half of all nursing home care. Gifts or transfers by nursing home residents can only be made by competent people or their properly authorized agents. In addition to "Medicaid planning" to preserve their assets, nursing home residents are legally permitted to provide for certain people, such as a spouse or disabled child.

Powers of attorney often fail for one of two reasons. The person signed a statutory "short form" power of attorney with limited or no gifting authority. Or he or she used an attorney-drafted document that negates the utility of the gift power. Too many attorneys include "gifting" provisions that are suitable for the Mercedes owner, when the client is still paying off a Chevy. In either case, the problem is only discovered when the principal is no longer competent—and thus unable to cure the problem by executing a new document.[1]

The first problem can be resolved by an amendment to the North Carolina statutory power of attorney that broadens the powers in the widely used form. The second is not so easily solved, but the beginning point is increasing the knowledge level of lawyers who do powers of attorney so that they appreciate the importance of gifting for government benefit programs.

The problem typically arises when the client goes to a lawyer for a will, and learns about the benefits of a power of attorney for possible incapacity. This is most obviously useful for the older client becoming reliant on relatives. The power of attorney allows another person, the agent or attorney-in-fact, to make financial decisions for the client, the principal. The agent is a fiduciary and can only act for the principal's benefit.

Giving away the principal's property, especially to the agent himself, is a breach of fiduciary duty unless specifically authorized. In most states, the principal may allow gift-giving by simply adding that power. Such "gifting" powers have long been standard elements in the documents drafted for the well-to-do to enable them to preserve wealth for

the next generation by avoiding federal estate tax. But the gift-giving powers used by the wealthy—the "Mercedes" version—are often inappropriate for lower- and middle-class clients.

Moreover, transferring real estate by a power of attorney lacking appropriate gifting authority can be a trap. The transferee does not get a good title, so the buyer cannot get title insurance. Like the inadequate power of attorney itself, the problem becomes apparent when it is far too late to cure.

North Carolina's elder law practitioners are beginning to study how the short form could be amended to offer gifting options that better fit the financial demands that families encounter. Also, we are getting the word out to practitioners that the gifting power drafted for the wealthy client might not accomplish the goals of their other estate planning clients.

The Short Form Power of Attorney—Short but Not Sweet.

North Carolina is one of 17 states that provide for an optional statutory power of attorney, known as "the short form." The short form's extremely limited gift authority often precludes families from preserving property when the principal needs nursing home care.

Who uses it? Often, it is the attorney who does not do high end estate planning. Or the form is used without a lawyer and is obtained from the internet or computer software.

The person executing a statutory short form power of attorney indicates, by initialing options, which powers she wants to give the agent.[2] These can include real estate transactions, banking, and other familiar categories.

The gifting options in the short form permit:

(14) Gifts to charities, and to individuals other than the attorney-in-fact

(15) Gifts to the named attorney-in-fact

Putting aside whether non-lawyers understand "gifts to the named attorney-in-fact," they surely do not realize that the power in the form is limited by statute to gifts "… in accordance with the principal's personal history of making or joining in the making of lifetime gifts."[3] It is hard to imagine the client who has a history of giving away his or her home or an interest in the home, or other significant assets. But such gifts are exactly the option that competent people often select when faced with the enormous costs of nursing home care. For the client who has lost competence, though, it is too late to execute a new power of attorney.

For many clients, the attorney's failure to offer a broader "gifting power" may be costly. One option is this provision: "I authorize my agent to transfer my property for the purpose of qualifying me for governmental medical assistance." The provision can be enhanced by specifying to whom property transfers can be made and in what shares.

Nursing Home Care… or "What the Client Least Wants to Talk About"

Nursing homes are an unappealing topic. But given the odds of needing care and the limited resources of most people to pay, clients executing powers of attorney should consider how they want the agent to proceed if nursing home care becomes necessary. The client might well direct that all of her resources be used to pay for her care, until depleted. No gifting power would be needed. But for the client who prefers to pass something to his family, an appropriate gifting power is necessary if the power of attorney comes into play.

What are the odds? Most people over 60 will need long-term care for some time. Medicare, contrary to widespread belief, covers very little nursing home care. Most care is paid by private payment (savings or insurance) and about half by Medicaid. Two out of three people who enter nursing homes as private pay residents exhaust their resources within one year and then rely on Medicaid.

Three aspects of Medicaid must be addressed if people are to make an informed choice about allowing gifts to be made with their powers of attorney: strict asset limits, estate recovery, and approval of some asset transfers. The person who obtains the statutory short form needs a form that includes an option for gifts to achieve eligibility for governmental assistance.

First, the asset limits. Consider the widow who has a home, $50,000, in savings and $1,000 per month income. Medicaid asset limits mandate that all but $2,000 of the savings must be spent before Medicaid will begin to pay. In most cases, she is allowed to keep the home.

Second, what must one know about Medicaid's claims against a person's estate, or "estate recovery"? Unlike Medicare or any health insurance you are familiar with, the Medicaid nursing home program essentially runs a tab on each recipient. With few exceptions, the state demands to be repaid. After a year on Medicaid, in our example the estate recovery claim would be about $42,000 and after two years $84,000. Soon there is no house or other asset left in the estate. This part of the equation can make the most artfully drafted will merely a futile gesture.

Third, federal Medicaid law *allows* families to protect some assets by transferring them. In particular, it permits transfers to a spouse or a disabled child. A home may be transferred to a caregiver adult child or a sibling co-owner. Any asset may be transferred to a trust for the benefit of any disabled person under age 65.

An important and common reason to include a gifting power is to provide for one's spouse. To protect the healthy spouse from impoverishment, federal law permits a "resource allowance." If the couple's assets are in the name of the incapacitated spouse, the "resource allowance" must be re-titled to the healthy spouse. This can best be accomplished using a power of attorney with a gifting power.

Without a broad gifting power, the family can seek guardianship. Court supervision and permission for asset transfers is required. Another option, not limited to married couples, is a special proceeding for approval to add a gifting power. Both of these procedures cost money and take time. It is a lot to ask of families who are already under tremendous stress.

Gift and Estate Tax Considerations are Only One Factor

The second problem with the gifting powers found in many powers of attorney is that they are written for the Mercedes owner when the client drives a Chevy. Federal estate and gift tax considerations should not dictate the scope of a gifting provision for such clients. In any event, they need to be balanced against the issue of Medicaid.

Many powers of attorney limit the agent to making annual exclusion gifts. These are gifts to individuals up to $11,000 per spouse per person per year, which are excluded from the federal gift tax. This amount is not sufficient to fund the "resource allowance" for a spouse or to transfer a home to a disabled child.

Second, some attorneys are concerned that overly broad gifting powers will expose clients to federal estate taxes by creating a general power of appointment.[4] This would cause the principal's estate to be included in the agent's taxable estate if he predeceases the principal.[5] The problem, not widespread, is avoided by requiring written concurrence for gifts to be given by someone other than the agent, typically one of the principal's other adult children or by a "special agent."

Ethical and Policy Issues Large and Small

Gifting powers raise big issues—from the micro-climate of the attorney-client relationship on up to the level of distributive justice and social needs.

For practitioners, our goal is to provide an atmosphere that allows the client to make free choices regarding the gifting power. We ask whether the older person is being pressured to protect assets for their family. Careful practitioners assess the family dynamics, meeting privately with the older client to elicit her goals.[6] Some attorneys will not accept payment of fees from the client's adult children, although the rules allow this. Procuring the document or taking the lead in client meetings to control the client are indicia of undue influence.

A broad gifting power may open the door to exploitation, especially of marginally competent older clients.[7] Mandatory disclosure language on the form would address this to some extent. Also, if the gifting language is free of jargon, people will better understand the import of the power being granted.

Another concern for the practitioner is that a broad gifting power allows an agent to frustrate the principal's testamentary goals by divesting assets differently. There are solutions. One is to draft the gifting provision to require gifts in accordance with the principal's will or with intestacy laws. Another is to require consent of all adult children to major gifts.

Some will oppose broader gifting options because they feel that Medicaid planning itself is against sound public policy, whether by a competent person or by his agent. They make two arguments.

First, they argue that assisting clients in becoming Medicaid eligible is unethical. A program intended for the poor, they contend, is being manipulated so that the middle class can shift their responsibilities to the public. Elder law attorneys would respond that we have the duty to present legal options. Certainly tax lawyers would not withhold advice from their clients to keep the federal deficit from growing. In any event, most attorneys find that they are assisting families with modest means to avoid the rapid impoverishment that results from a $60,000 annual nursing home bill.[8]

A similar argument is that gifting in powers of attorney to obtain governmental benefits undercuts personal responsibility and planning. Of course, that is true of all insurance, private as well as public. But most long-term care is being provided free by family members, strong evidence that personal responsibility and ethics are alive and well. And increasing numbers of people are planning ahead by purchasing long-term care insurance, though it is too expensive for many people.[9] While a comprehensive discussion with the client should include mention of the insurance option, this product is extremely difficult to assess. Moreover, those with chronic health problems are told that they need not apply.

Rather than question the ethics of Medicaid estate planning, perhaps we should ask whether our country's health care system itself is ethical or even logical.[10] Medicare covers expensive surgery, but not the devastating costs of chronic illnesses and strokes. Are these priorities in line with our moral values? Should we be looking at ways to ethically spread the tremendous burdens of caring for the disabled elderly? The desire to leave a legacy to one's children and grandchildren is a universal desire, not limited to the wealthy.

Proposed Changes

The North Carolina short form power of attorney is overdue for changes to better serve the public's needs. An option for gifts to obtain governmental assistance should be considered. And the estate and gift tax restrictions that apply to the few should not be thoughtlessly included in the powers of attorney of the vast majority of people. These changes would be two welcome gifts for the public. ■

Kate Mewhinney is a Clinical Law Professor at Wake Forest University School of Law, and the managing attorney of its Elder Law Clinic. She served as chair of the NCBA Elder Law Section in 2003-2004, and is a fellow of the National Academy of Elder Law Attorneys. Mewhinney is certified as an Elder Law Attorney by the National Elder Law Foundation and is also a Certified NC Superior Court Mediator. Information for practitioners about elder law issues can be found at www.law.wfu.edu/eclinic .

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Endnotes

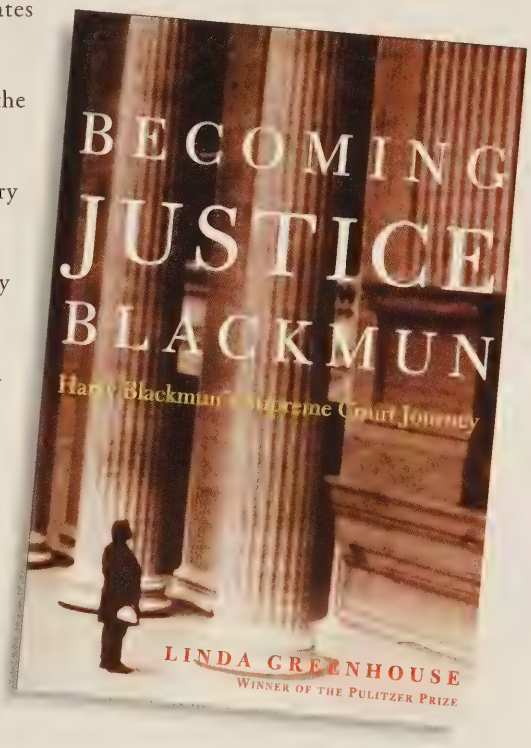
1. The author thanks Karen W. Neely for research when she was a student in The Elder Law Clinic, and elder law attorney Ron M. Landsman, of Rockville, Maryland, for critiquing a first draft.
2. A colleague describes seeing an attorney-prepared short form on which not a single power had been initialed, so the document accomplished nothing for the client!
3. N.C.G.S. § 32A-2 (15).
4. IRC § 2041.
5. In many elder law cases, gift and estate taxation will not be relevant since the assets of both the principal and the agent are less than the exemption equivalent of the unified credit. Andrew H. Hook, "Durable Powers of Attorney: They are Not Forms!" National Academy of Elder Law Attorneys' Symposium 2000, pp 1-51, 13.

   However, some argue that an unlimited gifting power does not risk creating a general power of appointment because the creator of the power must join in making the gift, at least by failing to revoke the power. *See* V. Tate Davis, "Basics of Elder Law," Potpourri for the GP (NCBF CLE), 4/29/05, fn. 50.
6. An NC State Bar ethics opinion provides that lawyers may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal. 2003 FEO-7. Another tool for attorneys is a recent ABA brochure, "Understanding the Four C's of Elder Law Ethics." www.abanet.org/aging/lawyerrelationship.pdf
7. Timothy Takacs and David McGuffey, "Revisiting the Ethics of Medicaid Planning," *NAELA Quarterly*, Summer 2004, pp. 29-37, 33.
8. Ellen O'Brien, "Issue Brief: Medicaid's coverage of nursing home costs: Asset shelter for the wealthy or essential safety net?" Georgetown University Health Policy Institute, Long-Term Care Financing Project, May 2005; "Long-Term Care Financing: Growing Demand and Cost of Services are Straining Federal and State Budgets," U.S. GAO, 4/27/05, GAO-05-0564T, p. 7. Charles P. Sabatino, "Debunking the Myths of Medicaid," *Legal Times*, 1/26/04, p. 25.
9. Fifteen percent or less of middle-aged or elderly persons in North Carolina might conceivably purchase long-term care insurance, based on wealth and income levels necessary to afford such a policy. Donald H. Taylor Jr., Ph.D.; "Alzheimer's Disease and the Family Caregiver: The Cost and Who Pays?" *NC Med Jl*, Jan./Feb. 2005, Vol. 66, No. 1, 18-24, 24.
10. Germany and Japan have universal long-term care insurance. Taylor, supra note 9 at 22; "International Approaches to Long-Term Care Financing and Delivery," Global Report on Aging (AARP), Winter 2004, pp. 5.

Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey

A Book by Linda Greenhouse, Reviewed by Mark A. Davis

Few justices on the United States Supreme Court ever changed over the course of their tenure as did Harry Blackmun. Dismissed by many soon after his appointment as merely a conservative clone of his childhood friend, Chief Justice Warren Burger, by the time of his retirement from the Court he was perceived as a reliable member of the Court's liberal wing. Simultaneously a hero and a villain to millions based on his authorship of *Roe v. Wade*, Blackmun became the living embodiment of the landmark (and controversial) 1973 Supreme Court decision articulating a right to an abortion under the United States Constitution.



Upon his death in 1999, Blackmun left his voluminous collection of papers—both official and personal—to the Library of Congress. In 2004, under the terms of his will, the collection was opened up to the public. In her new book *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*, veteran Supreme Court correspondent Linda Greenhouse of the *New York Times* has published the first biography of Justice Blackmun that draws from these papers. The result is a fascinating,

highly readable account of the life of one of the Twentieth Century's most interesting jurists.

Following his graduation from Harvard Law School, Blackmun tried his hand at private practice and achieved modest success before becoming in-house counsel for the Mayo Clinic, a position he filled for nine years. In 1959, he was appointed by President Eisenhower to the United States Court of Appeals for the Eighth Circuit. Eleven years later, he was nominated by President Nixon to serve on the Supreme Court, and he was easily confirmed.

Blackmun was not Nixon's initial choice for the appointment, his nomination occurring only after the nominations of Clement Haynsworth and Harrold Carswell failed to pass in the Senate. While always sensitive to personal slights (real or imagined), Blackmun maintained a self-deprecating sense of humor on this issue, referring to himself for the rest of life as "Old Number 3." When Anthony Kennedy joined the Court in 1987 following the failed nominations of Robert Bork and Douglas Ginsburg, Blackmun welcomed him into the "Number 3 club."

At the time Blackmun joined the Court, Burger had recently been named Chief Justice by Nixon. Much has been made of Blackmun's lifelong friendship with Burger and their relationship is a recurring theme in Greenhouse's book. As boys, they lived on the same street in Minnesota and first met in kindergarten. For the first few years that Blackmun was on the Supreme Court, the two voted together so frequently that they were dubbed "the Minnesota twins." By 1986 (Burger's last year on the Court), their relationship had fractured both personally and professionally to the point that they did not agree on much of anything. Over the years in which they served together, Blackmun broke with Burger on many important issues including the extension of constitutional protection to commercial advertising, affirmative action, and the Court's response to Watergate.

Prior to *Roe*, Blackmun's early opinions as a justice were relatively noncontroversial. A rare exception was his opinion in *United States v. Kras* in which he upheld a constitutional challenge to the filing fee attendant to a bankruptcy petition. He dismissed the claim of the indigent plaintiff, writing that the litigant could pay the fine in weekly installments for "less than the price of a movie and little more than the cost of a pack or two of cigarettes." This statement was perceived by some as evidencing a callous disregard for the plight of the poor. Nevertheless, he remained largely unknown outside legal circles.

Everything changed once he was assigned to write the majority opinion in *Roe* striking down a statute making it a crime to perform abortions except to save the life of the mother. Greenhouse speculates that Burger's decision to assign Blackmun the opinion was based on Burger's belief that Blackmun would write an opinion invalidating the statute on narrow grounds. If so, Burger was in for a rude awakening.

Upon receiving the *Roe* assignment, Blackmun immediately contacted the Mayo Clinic librarian and asked for books on the history of abortion. After months of painstaking research and writing, he produced a 50-page opinion which analyzed in great length the history of abortion along with an exploration of various medical issues relating to the procedure. In essence, his opinion divided a woman's pregnancy into trimesters, setting constitutional restrictions on a state's ability to outlaw abortions during the first two trimesters. Interestingly, Blackmun's notes show that even he conceded that his trimester approach was arbitrary.

Blackmun prophetically predicted that the Court would be excoriated for the decision. The day *Roe* was announced, former President Lyndon Johnson's death dominated the news. However, *Roe* was not ignored. Several days later, Blackmun was traveling to Iowa for a speech and was forced to obtain police protection due to the presence of antiabortion protestors. Thus began the after effects of *Roe* which Blackmun would have to live with for the rest of his life.

Over the years, Blackmun received tens of thousands of pieces of hate mail regarding *Roe*, most of which he read and all of which he kept. His opinion was most heavily criticized based on the widespread perception that it rested almost exclusively on historical and medical factors and that it announced a new constitutional right despite the absence of any clear constitutional language expressly protecting the right to an abortion. As Greenhouse points out, Blackmun's focus appeared to be on ensuring that a woman's doctor be free to give his or her best medical advice regarding the abortion decision without fear of criminal prosecution. To Blackmun, *Roe* was—at its core—about the rights of doctors at least as much as it was about the rights of women. Nevertheless, *Roe* made Blackmun a hero of the feminist movement.

In the decades following *Roe*, Blackmun found himself consumed by the decision and obsessed with ensuring its survival. While he had not sought the onus of writing the opinion, he recognized that it was the centerpiece of his judicial legacy.

During the last half of his tenure on the court, Blackmun continually fretted about the possibility of *Roe* being overturned. To his great chagrin, several cases began chipping away at *Roe's* foundation. However, in 1992, the moderate wing of the Court joined forces in *Planned Parenthood v. Casey* to definitively reject the argument that *Roe* should be overruled. While the reasoning of *Casey* was not completely faithful to the original *Roe* opinion, Blackmun was nevertheless greatly relieved that the basic right to abortion had been preserved.

Another theme explored by Greenhouse is Blackmun's evolving views on the death penalty. While he was never a proponent of capital punishment in his personal views, Blackmun as a judge upheld the death penalty on a number of occasions before ultimately concluding near the end of his career that the death penalty—while constitutional in the abstract—could never be fairly applied. He famously declared in a dissenting opinion during the 1993 Term: "From this day forward, I no longer shall tinker with the machinery of death." From that point on, he never voted to uphold the death penalty again.

His sympathy for the underprivileged in society was nowhere more evident than in the Court's 1989 decision in *DeShaney v. Winnebago County Department of Social Services.* In that case, the Court's majority rejected the notion that a county department of social services had an affirmative duty under the Constitution to protect a boy who was brutally murdered at the hands of his father. "Poor Joshua" began Blackmun's heartfelt dissent in which he

lamented the majority's opinion.

Greenhouse recounts numerous passages from Blackmun's journals and private correspondence. A habitual chronicler since childhood of events in his life, Blackmun wrote down details about not only his thought processes, but also concerning his insecurities and perception of the Court. Blackmun was less than giddy about his initial appointment, referring to it in his private notes as a "crisis" and stating that the "roof has caved in." Indeed, upon first being offered the position by Nixon, Blackmun made a list of the pros and cons of accepting the appointment. Later, in assessing his years on the Supreme Court, he wrote that "[i]t has not been much fun."

Among his habits was jotting down notes about lawyers during oral arguments which addressed not only their skill as advocates, but also their appearance. In one such entry, he wrote that future Justice Ruth Bader Ginsburg was clad "[i]n red & red ribbon today."

The book offers a number of other delicious tidbits, including the fact that the member of Nixon's staff who was the point person for Blackmun's nomination was a young lawyer named William Rehnquist. In a memorandum to Nixon, Rehnquist wrote that Blackmun "can be fairly characterized as conservative to moderate" on criminal and civil rights issues. He further described Blackmun overall as "more conservative than liberal." Greenhouse also quotes from notes of a meeting with Blackmun in which Nixon—while discussing public service—made the poignant observation that "one is either honest or dishonest in government."

The primary defect with Greenhouse's book is simply that it is too short. Two hundred fifty-one pages is simply not enough to adequately chronicle Blackmun's career on the Supreme Court—which spanned from Nixon's pre-Watergate presidency through Bill Clinton's first term and encompassed a number of the most significant cases of the last 35 years. Nevertheless, *Becoming Justice Blackmun* is must reading for anyone interested in the inner workings of the Supreme Court or the life of one of its most intriguing justices.

More than a decade after Blackmun's departure from the Court, a Supreme Court nominee's fidelity to *Roe* remains a litmus test for many special interest groups and senators. This perhaps is his ultimate legacy. ■

Mark A. Davis is an attorney in the Raleigh office of Womble Carlyle Sandridge & Rice, PLLC.

About the book's author: Linda Greenhouse has covered the Supreme Court for The New York Times since 1978 and won a Pulitzer Prize in 1998 for her coverage of the Court. She appears regularly on the PBS program Washington Week and lectures frequently on the Supreme Court at colleges and law schools. She graduated from Radcliffe College and holds a master of studies in law from Yale Law School.

Times Books/an imprint of Henry Holt and Company, May 2, 2005, 288 pages, ISBN 0-8050-7791-X, $25.00

An Interview with Our New President—Calvin E. Murphy

Q: What can you tell us about your roots?

I am a Charlotte native, born and raised. I graduated from J.H. Gunn High School, a community school in the East Mecklenburg neighborhood where I grew up. I am the youngest of four children (two boys; two girls) born to Grover and Louise Murphy. My paternal grandfather (Alonzo Murphy) owned a small farm in the area where I grew up. I spent a great deal of time with him before he died in the early 60s. It was from him that I learned what it meant to be a responsible adult. I dearly loved and respected my grandfather. To this day, I own the land where he lived and farmed until his death.

Q: When and how did you decide to become a lawyer?

In 1962—at age 14—to complete a class project, I had to interview the Mecklenburg County Sheriff. While I waited in an outer office to meet with the sheriff, a tall, well dressed, well spoken black man entered the office. The deputies greeted him warmly and respectfully. One of the deputies promptly alerted Sheriff Don Stahl that he had a visitor—not me. The sheriff emerged from his inner office immediately, acknowledged the man, and invited him inside. I thought to myself...this man must be someone special to receive that kind of greeting from the sheriff himself. I later learned from one of the deputies that the man was a lawyer—Charlie Bell. I was hooked. It was at that very moment that I knew I wanted to be a lawyer.

Q: What is your practice like now and how did it evolve?

My practice is principally criminal defense work. After law school my original plan was to join a firm and practice criminal law with another classmate in his brother's firm in Chapel Hill. On reflection, I decided the better course would be to get some experience before unleashing all of that book learning on some unsuspecting client who perhaps unwittingly placed his freedom in my novice hands. And, what better way to get that experience without sacrificing some poor soul to jail than as a prosecutor. The worst thing that would happen if I made a mistake was that someone would not go to jail. After five years of prosecuting—finishing with a two-year stint as a career criminal prosecutor—I went into private practice. In 1989, Ron Chapman and I started a separate practice—Murphy & Chapman, PA—where I have remained to this day.

Q: If you had not chosen to pursue a career in law, what do you think you would have done for a living?

All during high school, I fancied myself a mathematician and loved the subject. Even when I entered Davidson College as a freshman, my intention was to major in math, then go to law school. The back-up plan was to get a degree in architecture if I did not get into law school. My first semester calculus professor quickly disabused my mind of the notion of becoming a mathematician.

Q: How and why did you become involved in State Bar work?

For six years before running for a position as a State Bar Councilor, I served on the Mecklenburg County Bar Grievance Committee, and for a term on the board of the local bar. I thoroughly enjoyed the work. Karl Adkins and Ron Gibson were the first two black attorneys from Mecklenburg to be elected to the council in the early 80s. By the time Karl's term expired, Ron Gibson had already left the council and there was no other black attorney on the horizon who seemed interested in succeeding Karl. I jumped at the opportunity to serve my profession at the state level and, fortunately, was

We want your fiction!

Historical Fiction *Romance*
International Espionage
Humor *Science Fiction*

Fourth Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Fourth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, ***the article may be on any fictional topic and may be in any form*** (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. Articles should not be more than 5,000 words in length and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on May 26, 2006. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is May 26, 2006

With his daughter, Sommer Joy Murphy, looking on, Calvin Murphy is sworn in as president of the State Bar by Chief Justice I. Beverly Lake Jr.

elected.

Q: What has your experience on the State Bar Council been like? What has surprised you most? What has pleased you most? What has troubled you most?

Without question, my work at the State Bar has been the most rewarding of my professional life. I am not sure what I expected when I arrived there, but what I found was a cadre of the most committed, respected, and talented lawyers in the state. Most surprising was the level of professionalism that I encountered. Lawyers—noted for holding strong beliefs and opinions—were more than willing to hear opposing points of view and change their positions in the light of sound judgment and reason. Still a source of concern to me is the absence of ethnic, racial, and gender diversity on the council. There is much work to be done in that regard.

Q: Prior to becoming an officer you served as chair of the Grievance Committee. What was that like?

That was an eye opener. During my term as chair, the State Bar received, on average, between 1900 and 2000 grievances each year. Although 80-85% were dismissed for failure to allege an actionable violation of the Rules of Professional Conduct, there were still too many. I felt it was my challenge to do something to stem that number. Earlier, the Bar had implemented the Client Assistance Program, but we had not developed sufficient data to determine the direct impact the program was having on the number of grievances filed. It was clear, however, that the rise in grievances tapered when compared with the rise in the number of lawyers in the state.

Q: Last year, while serving as the State Bar's president-elect, you were appointed to chair a special committee to look into the State Bar's handling of a controversial disciplinary case against two prosecutors who wrongfully withheld evidence from the defense in a capital case. Tell us about that experience and what you learned from it.

The Disciplinary Review Committee was charged with reviewing what happened in the handling of that situation to determine how we might improve the State Bar's disciplinary process. We were not charged with correcting any wrong, or perceived wrong, that occurred during the handling of the underlying case against the two prosecutors. It was a historic undertaking in the sense that this was the first time in the history of the State Bar, at least to my knowledge, that we opened the disciplinary process to public scrutiny. There had been a great hue and cry from the media and from segments of the bar, particularly from the criminal defense bar, that, generally, the State Bar lawyers had failed to investigate adequately the case before trial and had failed to prosecute with sufficient zealousness, notwithstanding the fact that the Disciplinary Hearing Commission had found in favor of the State Bar concerning three out of four violations that had been alleged in the complaint against the two prosecutors. It became evident to me early on that, because we are permitted to regulate ourselves as a profession, the appearance of how we do things can be just as important as we do them. On the committee were some of North Carolina's educational, political, legal, and media luminaries. The committee produced a final report containing a number of recommendations that the Bar has already begun to implement. I was most pleased that the final report was by consensus; there was no minority report. All of the committee's meetings were open to the public, and the final report, along with all witness interviews,

were published on the State Bar's website.

Q: Do you think lawyers can be trusted to regulate themselves? Is our system seriously flawed? Is there anything about it that you would like to see changed?

I honestly believe that the lawyers of this state do an exceptional job of self-regulation. We have public members who serve on the Grievance Committee, and have for many years. In addition to serving two terms as president, I served on the Grievance Committee as a lawyer-member for seven years. On many occasions, the discipline that lawyer-members felt was appropriate in a particular situation was much more severe than the public members felt was called for. My perception is that lawyers often tend to be harder on their own than others might be. I have yet to witness an instance when "cronyism" or any other such influence was a factor that affected the outcome of a disciplinary matter. That the State Bar has willingly opened its disciplinary system to public inspection this past year suggests to me that if there are flaws in the system, the State Bar is not afraid to have someone point out that "the Emperor has no clothes" and to respond in an appropriate way. I do not believe the system is seriously flawed. And, in those areas where the need for change has been identified, the Bar has responded appropriately.

Q: You're only the second African-American to be chosen as the president of the North Carolina State Bar. In your mind, how significant is that? Are we anywhere near where we ought to be as a profession as far diversity is concerned?

There are roughly 20,000 lawyers in this state. Although the State Bar has never sought to capture or maintain data regarding race and gender of North Carolina lawyers, I think it is fair to say that minorities are underrepresented in the general population of lawyers when compared to their presence in the state. The number of female lawyers is growing rapidly. According to my daughter, a first year law student at North Carolina Central University School of Law, over 60% of the students in her class are female, suggesting perhaps that the number of women lawyers in the profession is growing disproportionately to their male counterparts. Although statistically small now, the number of Hispanic and Asian attorneys in North Carolina is growing. And, those numbers will only increase. Currently, we have only three black councilors (5% of the council) and seven female councilors (about 12%) of a total of 55 councilors for the state. Hispanics and Asians are currently unrepresented on the council. We can do better; we must do better. Black, female, Hispanic, Asian, and other minority lawyers must be willing to make the sacrifice and participate in local bar elections, and local bars must make clear that participation by diverse groups is important to the overall health and welfare of the profession. There is much to be done to make our Bar more reflective of the community we serve.

Q: What in your opinion is the greatest challenge facing the legal profession at this time? What can the State Bar do that would make a difference?

In my installation speech, I said that I intended to make professionalism a focal point of my administration. Unfortunately, the public's perception of lawyers remains one of the profession's greatest challenges. As a state agency the Bar has the daunting task of regulating lawyers and protecting the public from those who lose sight of their calling or of their duties of loyalty and service to their clients, to the court, or to the profession. And service should be the clarion call to all of us, for it is lawyers who stand tall between the citizenry and the excesses and overreaching of government. It is lawyers who help ensure that the least and greatest of our citizens enjoy the guarantees of life, liberty, and the pursuit of happiness assured to us by the Constitution of this great nation. The orderly administration of the law is the single-most important deterrent to outright anarchy in our society. And, the great defenders of that order are invariably lawyers. With such awesome power at their disposal, lawyers have an obligation and duty to conduct themselves in such a way as to command honor and respect for themselves, for the law, and for the institutions of justice. The way we conduct ourselves in court, before the public, and with each other is perhaps the single most important aspect of who we are. It is the measure by which we, and the profession, are judged. Being good stewards of the law means that how we conduct ourselves is just as important as the service we provide. It is a charge we cannot afford to under serve or take lightly.

Q: Tell us a little about your family?

I have two children, a daughter-in-law, and one grandson, all of whom I am enormously proud. My daughter, a licensed securities broker, is now a first year law student at North Carolina Central University School of Law. She called a few days ago elated that she "aced" her first law school exam. My son is one of Atlanta's finest, having just completed rookie school this year. He now works as a line officer with the Atlanta Police Department. His wife is a stay-at-home mom to my nine-month-old grandson, Caleb Hunter Murphy. I have three siblings: a sister who lives in Charlotte not far from me, a brother and his wife in Miami, Florida, and a sister and brother-in-law in Baltimore, Maryland. We are all very close to each other.

Q: What do you enjoy doing when you are not practicing law or working for the State Bar?

Actually, there is very little time for much else. Occasionally, I get a chance to go white-water rafting—one of my passions. And I enjoy travel. Last year I spent two weeks cavorting about London, Barcelona, and Paris with my daughter. If my schedule will permit, I intend to arrange a trip to Africa soon. I have heard that an activity is work only if you would really rather be doing something else. It would be hard to convince me that Michael Jordan "worked" every day on the basketball court. I love practicing law and I find great enjoyment in the work of the State Bar. Despite the rigorous schedule that I keep, both pursuits bring me a great deal of satisfaction and pleasure.

Q: How would you like to be remembered by the next generation of lawyers?

It would be nice to be remembered, period, if just by name. But that may be asking a lot. The point I think I want to make now, and to have all lawyers remember, is that what we do as individual lawyers may be shaping the ideas, dreams, and aspirations of future lawyers. I doubt that Mr. Bell ever knew what impact he had on the direction of my life. We should be careful to make and leave positive impressions in our personal, professional, and public lives. I hope that I have made a positive difference to someone on my journey through the profession…and through life. ■

IOLTA News Becoming More Positive

Income

Following a significant income decline over the last few years due to low interest rates paid on IOLTA accounts, income is significantly improved in 2005. We are now meeting monthly income projections necessary to keep 2006 grants at least level without again using funds from our reserve, as we did for the first time for 2005 grants. Income increases are the result of some increases in interest rates paid, improvements due to bank mergers resulting in more IOLTA-friendly policies, and increased numbers of IOLTA accounts. We are hoping that the work we are doing to improve policies at participating banks and the increase in the Federal Reserve interest rate will continue the increase in NC IOLTA income.

Grants

In order to make over $3 million in grant awards for 2005, the trustees did for the first time use funds (just under $400,000) from the NC IOLTA Reserve Fund (which had totaled just over $1.5 million). The trustees were pleased to be able to protect our continuing grantees, which provide direct legal services to the indigent in North Carolina, by keeping those grants almost completely level, though most administration of justice grants were decreased slightly.

Grant applications for 2006 were made available in July and were due to the IOLTA office by Monday, October 3, 2005, to be reviewed in early December. The 29 applications that we have received request a total of $3.6 million, compared to $3.5 million in requests for 2005.

NC IOLTA Receives Award

The NC State Bar's IOLTA program has been named Outstanding Philanthropic Organization for 2005 by the Association of Fundraising Professionals, Triangle Chapter. The award was presented at a ceremony held during the celebration of National Philanthropy Day on November 17, 2005, at the NCBA Bar Center.

New Participants

Your Interest Does Make A Difference!

Thanks to the following attorneys and firms who have joined the NC IOLTA Program since July 2005.

Participation in IOLTA does not affect a lawyer's trust account practices and never affects the principal balance of the account. The participating bank calculates and remits all accumulated interest, less service charges, directly to IOLTA. Lawyers still retain complete discretion to determine whether a trust deposit is of sufficient size or duration to justify placement in a separate interest bearing account for a client.

To learn more about the IOLTA program or to become a participant, please call the IOLTA office at 919/828-0477.

Baker & Blake, LLP, Charlotte
Baker-Harrell, Woodrena, PLLC, Durham
Brotherton, Susan D., Statesville
Butler & Hosch, PA, Charlotte
Carruthers & Roth, PA, Greensboro
Cline, Todd W., Charlotte
Collum, Travis E., PA, Mooresville
Dillow, McEachern & Associates, PA, Wilmington
Dowless Law Firm, PC, Charlotte
Doyle & Doyle, PA, Knightdale
Eatmon, Joseph Michael, Bailey
Ewing Law Center, PC, Durham
Goldfarb, William K., Monroe
Grubbs Law Firm, PA, Kernersville
Hall, F. Wade, Asheville
Hart, Ericka Fitch, Rocky Mount
Hayes Law Firm, Asheboro
Hayes, Ray A., II, PA, Cornelius
Holmes Law Firm, Lillington

CONTINUED ON PAGE 61

PARTICIPATING FINANCIAL INSTITUTIONS

Banks denoted in**green** have increased the value of their partnership with IOLTA by paying higher interest rates and reducing or waiving service charges resulting in additional funds available for grants.

Alamance National Bank
Anson Bank
Asheville Savings Bank

Bank of America
Bank of Asheville
Bank of Granite
Bank of North Carolina
Bank of Stanly
Branch Banking and Trust

Cabarrus Bank & Trust Co.
Capital Bank
Cardinal State Bank
Carolina Bank
Carolina Commerce Bank
Carolina First Bank (South Carolina)
Carolina Trust Bank
Catawba Valley Bank
Citizens South Bank
Coastal Federal Savings Bank (SC)
Cooperative Bank for Savings
Crescent State Bank

East Carolina Bank

Farmers & Merchants Bank
Fidelity Bank
First Bank
First Capital Bank
First Charter Bank
First Citizens Bank
First Federal Savings Bank of Lincolnton
First Gaston Bank
First National Bank and Trust Co.
First National Bank of Shelby
First South Bank
First Trust Bank, Charlotte
FNB, Southeast
Four Oaks Bank & Trust

Harrington Bank
Heritage Bank
High Country Bank
High Point Bank & Trust
HomeTrust Bank

Lexington State Bank
The Little Bank
Lumbee Guaranty Bank

Macon Bank
Mechanics and Farmers Bank
Mid Carolina Bank
Mountain 1st Bank

New Century Bank
NewDominion
North State Bank

Paragon Commercial Bank
Port City Capital Bank
Premier Federal Credit Union

RBC Centura
Regions Bank
Roxboro Savings Bank

Scottish Bank
Securities Savings Bank
SoundBank
SouthBank, Durham
Southern Bank & Trust Company
Southern Community Bank & Trust
SterlingSouth Bank and Trust
SunTrust Bank (formerly CCB)

United Community Bank

Waccamaw Bank
Wachovia Bank, N.A.

Yadkin Valley Bank

*If your bank is not listed and you wish to participate, please contact IOLTA at 919-828-0477; or via e-mail at IOLTA@ncbar.com; or by mail at PO Box 2687 Raleigh, NC 27602

Achieving Balance as a Lawyer

By Don Carroll

Lawyers are increasingly aware of the need to find balance in their lives. Balance between home life and work life. Balance between the need for physical exercise and sitting long hours in an office chair. Balance between the mental activities of long factual analyses and hours of library research, and one's emotional needs for fun and interaction with others. And finally, the kind of over-arching balance that goes with the connection to all aspects of one's self and the connection to what is greater than one's self—spiritual balance.

Despite awareness of the need for balance, for many of us, this balance thing does not seem to be working. Lawyers are signing up for health clubs, taking yoga classes, and reading self-help books, but many complain that their lives are too busy, and that despite their best efforts, nothing is changing. In this article, let's take a look at some of the reasons that the change you desire in your life may not be occurring.

In order to do this, we need to understand the sources of input for the decisions that we make. We make decisions from our mind, body, and heart. Ideally, any decision we make would come from an integration of these three different processes.

By knowing the source of most of our decision making, we get a better idea of whether our process for making decisions about our well being is itself balanced. Let me illustrate the way decisions are made from each of these centers. Assume that you get into an argument with a friend. (1) The lawyer who makes decisions from the mind would respond by seeking to sit down with the friend and rationally work out the problem. (2) The lawyer who makes decisions from the heart would have behavior based on an emotional reaction to the argument. He might give his friend a hug and say "let's start over." (3) The lawyer who makes decisions from the body would have a physical reaction. For example, this lawyer might just get up and leave or in a worst case scenario, hit his friend.

FRIENDS PALS

We, as lawyers, are used to giving our clients advice by using the analytical resources of our minds. And, although we often feel that we are very reasonable and rational in making decisions, many of us, despite our good cognitive abilities, make decisions based upon our emotional reactions to events and ideas. If our decisions just come from the emotional center and are not balanced by physical needs and cognitive insight, they are apt to result in decisions which do not really work for us. A lot of us are tenacious lawyers because of our motivation to do justice for our clients. If we are zealous, but only in a rational, cognitive manner, our decisions may be out of balance, because we do not adequately take into account the emotional feelings and values of our decisions.

The key then to making realistic decisions that balance our lives, lies in balancing and involving all three of the decision-making resources that we bring to bear, along with our spiritual understanding of what would suit us best.

Then, the next step in achieving balance is to define what a balanced life means. This definition is going to vary for each of us. No one can define balance for another person. In defining balance we need to determine consciously what that is for each of the three aspects of our decision making. Our bodily or instinctual aspects will want to be sure that the decision we make is going to allow us to survive and thrive. The emotional feeling aspect will want to make sure that our

decision is going to provide sufficient value and meaning. And our mental aspect will want to make sure that our decision is logical, practical, and something that can actually be done.

Try to think of a time when life seemed to be in balance, when each of these different internal aspects seemed to feel comfortable with the decisions being made in your external life. What did that balance look like then? What would a balance look like to you now?

Just as each of the sources of our decision making needs to be brought to bear in defining what a balanced life is for ourselves, so do we also need to take into account the needs for each of these parts. I have read numerous articles about the problems that college and law students have in school. The common denominator through all these studies is that the students do not get enough sleep. I don't think that necessarily changes after you graduate from law school. If you are going to have a balanced life, you must, at a minimum, get sufficient sleep.

We know now how the pressure of practicing law can trigger the hormonal stress response system in such a way to severely strain the body. Sleep, and particularly that sleep gained in the fourth and last cycle of sleep, is critical to replenishing the neurotransmitters that make us enjoy life, and that get depleted by the stress response reaction. Almost as important as good sleep habits are good eating habits. We must, at a minimum, eat well or over time we are going to create health problems or stress-related issues for ourselves from bad eating habits. The goal is not simply to eat the right diet, but to enjoy the process of eating. To eat good food with people whose company we enjoy. This three times a day ritual is very important to us for reasons beyond just getting the basic nutrients that the body needs. It is directly related to the third thing the body needs for its well-being, and that is relaxing and engaging in enjoyable activities. The body's need for sufficient sleep, good food, and relaxation and fun must all be a part of our work-life balance equation.

The heart, or the feeling aspect of our being, is most often what gets left out in the work-life balance, and what is often most important. It is from the feeling aspect in our lives that we experience joy and appreciation for what we do. It is our feeling aspect which connects us to those we care about. It is also our feeling aspect which applies the motivation to actually engage in trying to achieve a work-life balance. If our emotional belief system is that we must work 80 hours a week to be a successful lawyer, then chances are slim that we are going to be able to obtain changes in achieving a positive work-life balance. Less obvious, but often just as harmful as a work-only life, is the failure to appreciate the need for engaging in activities which are going to make us feel valued as a person and connected to other people and to the ideas we believe in.

Of course, we need to do what is necessary to see that the mind gets the exercise it needs. We have been doing that by the thought processes in reading this article and assessing our own work-life balance needs. And, we will use this resource in the writing down of our work-life balance plan, and figuring out how we will execute that plan. For almost all of us, the mind is our strong suit, but it can still get neglected in the decision-making process. The danger, on one hand, is that the mind will not be involved, and on the other, that it may dominate in some cold and rational way, which will exclude the needs of the body and heart.

If we find ourselves stuck in trying to achieve a healthy work-life balance and not being able to get there, we may want to seek help from a therapist or coach. It is often impossible alone to get a handle on the negative belief structure that may be undermining our achieving what we want. This can readily be done with the help of a good therapist or coach.

All of our internal sources of decision making are strengthened and illuminated by help and insight from outside ourselves. The more one is spiritually connected to others and to beliefs beyond one's self, the more one has an overall resource to be sure that the work-life balance is the one that fits. Surveys show that people who have a religious or spiritual life live longer and enjoy life more. Those who bring their spiritual needs and aspects into their decision making process for work-life balance are more likely to get a balance that leads to a healthier, more enjoyable life. So after you have gotten input from the body, mind, and heart on your work-life balance plan, get spiritual input. For those of a religious tradition, this input will come from what your faith would suggest; for those outside any religious tradition, ask yourself what guidance would something outside yourself, that loved you and cared for your well-being, say about your plan. When our decision making process accesses the needs and resources of all four sources of input, we should be able to come up with a plan that will work and that we will actually implement. Implementation may not be easy until a new pattern has been established, but once we have followed our plan for several weeks, it should begin to feel natural as it reflects all of whom we are. Of course, a good plan will also be flexible and resilient as we change and grow.

Okay, we have a framework. For all of us who have, within the past six months, complained to other people that our work-life is out of balance, here's our task—schedule a time to sit down and begin to use the ideas in this article to figure out what your own work-life balance should be and use all four aspects of your decision making in deciding how to achieve this balance. If we use all of our decision making aspects, we are much more likely to do what we would like to do. If you find yourself resistant to taking any time for this sort of self-care, then perhaps you'll want to call a counselor and get some help in uncovering what your resistance is about, so that you can get back on track to achieving the kind of work-life balance you would like and the kind of life you desire. It's your choice. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers. The Lawyer Assistance Program has two outreaches: PALS and FRIENDS. PALS addresses alcoholism and other addiction; FRIENDS depression and other mental health problems. If you are a North Carolina lawyer or law student and would like more information go to www.nclap.org or call toll free: Don Carroll (for Charlotte and areas West) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down East) at 1-877-627-3743.

Philip Alan Levine

Canal Street Garage

Each quarter, the works of a different contemporary North Carolina artist are displayed in the two large storefront windows of the State Bar building. The artworks enhance the beauty of the exterior of our building and provide visual interest to pedestrians passing by on Fayetteville Street Mall. The State Bar is grateful to Melissa Peden, of Peden Art Consultants, for her assistance in selecting appropriate pieces and to the Raleigh Contemporary Gallery (RCG), the artists' representative, for arranging this loan program. Readers who want to know more about an artist may contact Melissa Peden at 919.829.9096, or Rory Parnell at the RCG, 323 Blake Street, Raleigh, NC 27601 (919.828.6500).

"As a human being I find life a complex collage of emotions and movements of forms in space. Painting is discovery, just like life. I'm always finding new things in each picture as it develops. I try to put everything in its place and have a place for everything. It's one big totality which includes harmony, orchestration of color, lines, volume, forms, verticals, and horizontals in space. Each work is also an expression of emotion. Artists are basically workman just like a carpenter or brick layer, you get nothing without hard work."

Phillip Levine came to Raleigh from New York City 13 years ago. His bold, intense style is reminiscent of early European expressionism. Humor enlivens his work/his paintings but it can also be somber and foreboding. As a lifelong painter, Levine works quickly, almost impatiently. Despite being color blind, he paints in rich, earth tones. His lines have a rare flow and his compositions often center on a small group of figures, plainly stated and caught in an everyday moment. His work has been shown at numerous galleries in Raleigh including the Stevens Gallery, Gaddy-Goodwin Theater Gallery at the Raleigh Little Theater, and the City Gallery of Contemporary Art. He has also shown at several galleries in Jamaica.

In a critique of a showing of Levine's collages at The Exhibitionists Gallery in Jamaica in 1979, Jeanne Paris, a local critic, described Levine's work as "concerned with shapes, space, and feeling....It is in the arrangement of realistic objects and abstract forms in space which create the excitement found in his work. " ■


Still Life

Walking the Ethical Line with Lawyer Advertising

By Alice Neece Mine

Lawyer advertising has constitutional protection and is permitted under the Rules of Professional Conduct if "truthful and not misleading"—so how do you know what is within the legal and ethical lines and what is not? This article is the first in a series that will provide practical advice on permissible lawyer advertising.

Where is the line?

Not so very long ago (about 27 years), lawyer advertising and "self laudation" were prohibited by every bar in the country. Canon 27 of the 1908 Canons of Professional Ethics provided that "solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relation, is unprofessional" and all forms of self-promotion "offend the traditions and lower the tone of our profession and are reprehensible." No doubt there are many lawyers who still agree with these sentiments, but, for better or ill, the United States Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 447 (1978), recognized that the First Amendment extends to lawyer advertising and that a state may not constitutionally prohibit a lawyer's newspaper advertisement for fees for routine legal services. A state may, however, prohibit commercial expression that is "false, deceptive, or misleading" and it may impose reasonable restrictions as to "time, place, and manner." Unfortunately for regulatory agencies such as your State Bar—and for lawyers—the court provided little guidance as to what is false or misleading in lawyer advertising and what restrictions are reasonable.

The Supreme Court fleshed out the commercial speech doctrine in a non-legal context in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The Court held that inherently misleading commercial speech or commercial speech that has been proven to be misleading may be absolutely prohibited but other restrictions are appropriate only where they serve a substantial state interest, directly advance that interest, and are no more restrictive than reasonably necessary to serve that interest. The court provided a little more guidance, perhaps, but no specific directions for determining whether, for example, an advertisement lauding a lawyer's million dollar jury verdict is misleading even if true and, if misleading, the extent to which such an advertisement may be restricted. Is a disclaimer ("each client's case is unique; no specific results implied or guaranteed...") the least restrictive means of protecting the public or is an outright prohibition allowed? What if the average consumer wants to know the verdict record of the lawyers she is considering hiring?

The North Carolina Rules of Professional Conduct do not include a laundry list of the kinds of information that might be ethically included in an advertisement nor do they list specific statements, information, or forms of advertising that are prohibited. Instead, Rule 7.1 incorporates the *Bates* and *Central Hudson* fundamental requirement for all permissible commercial speech: the rule simply prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. The rule adds that false and misleading communications include all of the following: a material misrepresentation of fact or law, an omission of a fact necessary to make a statement not misleading, statements that are likely to create unjustified expectations about results that a lawyer can achieve, and a comparison of the lawyer's services with other lawyer's services that cannot be factually substantiated. Comment [2] to Rule 7.1 does clarify that an objective standard should be used to evaluate whether a statement is misleading. The comment notes that a statement in an advertisement is misleading when "there is a substantial likelihood that it will lead a *reasonable person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable *factual* foundation." [Emphasis added]

Staying Well Within the Lines

In the absence of specific guidelines and prohibitions, what is a lawyer who wants to advertise allowed to do without violating the Rules of Professional Conduct? Clearly, the old "tombstone" ad, with the names of the firm's lawyers, a firm address and phone number, a list of legal services offered by the firm, and the charges for those services, is permissible because it contains purely factual information that is neither false nor misleading. (Interestingly, the ad that sent lawyer Bates before the Arizona Bar authorities was not much more than this, although it did claim that his legal services were offered "at very reasonable fees.") To the extent that an advertisement goes beyond bare bones facts about the firm, however, there is the potential, intended or not, to mislead. Nevertheless, the standard is an objective one, and the Rules of Professional Conduct are themselves rules of reason. Minor puffery ("we care"), soft endorsements ("they treated me with respect"), and implied attributes ("we're bulldogs") are generally considered non-material, unlikely to mislead a reasonable person, and within the ethical line. Beyond the boring but safe simple tombstone ad, the line between what is permitted and what is not becomes fuzzier, particularly with regard to dramatizations in radio and television commercials. Advertising that crosses the line into the realm of misrepresentation, unjustified expectations, and unsubstantiated comparisons will be examined in the next article in this series. ■

A Profile in Specialization

By Denise Mullen, Assistant Director of Legal Specialization

Recently, I had an opportunity to talk with Cynthia Aziz, a certified specialist in immigration law, and current chair of the immigration law specialty committee. Cynthia graduated from Mount Holyoke College in South Hadley, Massachusetts, and from The New England School of Law in Boston in 1987. She is licensed to practice in both Massachusetts and in North Carolina. A wider variety of job opportunities led her to settle in Charlotte and she is currently the principal in the firm of C.A. Aziz, PA, located in Charlotte. Practicing with her are Elizabeth Edwards and Kim Smithwick. Her comments on specialization in immigration law follow.

Q: Why did you pursue certification?

I became certified with the first class to take the immigration law exam, back in 1997. I really felt that it was an important step to take professionally. It provides a public service and establishes a standard for the public to measure competency. I wanted to set myself apart as someone who is committed to this practice area.

Q: How did you prepare for the examination?

At that time, there were no study guide materials available to applicants, just a list of possible topics areas. I read recent seminar information and current articles. I really focused on areas that I didn't see in my practice, areas that I would typically refer out.

Q: Was the certification process (exam, references, application) valuable to you in any way?

The process was very useful. In studying, I completed a very thorough review of immigration law. I also very much appreciated the positive references from my peer group. It was a nice acknowledgment of my level of professionalism.

Q: Has certification been helpful to your practice? In what ways?

It has been helpful, but not in traditionally measurable ways. Being a specialist and aware of specialization, I often use my directory to make referrals to other specialists. I know I get referrals from other specialists in the same way. When I speak in public forums, I always try to educate people about how to choose a lawyer. I do let them know about the directory of specialists that the State Bar publishes each year, as well as the online version.

Q: What do your clients say about your certification?

Sometimes they ask about my credentials and I explain certification to them. I see it as an opportunity to let them know that I am committed to immigration law and that I am serious about continuing to improve my skills as an immigration practitioner.

Q: How does your certification benefit your clients?

Specialists have more stringent continuing legal education requirements, and fulfilling those requirements helps me to stay current and to keep informed of the frequent changes in the law. I also serve on the State Bar committee that oversees the program and writes the examination. Working with the other committee members to draft exam questions and answers each year provides a tremendous opportunity for dialogue. We write the exam questions from our experiences and discuss the cases we've handled. Talking to colleagues about the tough issues that arise helps each of us become better practitioners.

Q: How do you stay current in your field?

Because immigration law changes so frequently, I am constantly reading to keep myself updated and to look for modifications that may affect my clients. I am a member of several list-serves and I attend numerous continuing legal education courses each year, including those sponsored by the American Immigration Lawyers Association (AILA).

Q: Is certification important in your practice area?

It is. In an ideal world, it would serve to discourage dabblers who really provide a disservice to clients. Immigration law has become too intricate and full of oddities for someone to dabble successfully. Certification encourages continuing education and limiting one's practice to the specialty area, both of which ultimately make us better advocates for our clients.

Immigration practitioners have been around in the Carolinas for about 30 years and the need is greater today than ever before. There are also a lot of non-lawyers doing this work. It is a consumer protection issue. Unfortunately, the nature of our clients makes it easier for them to fall prey to the unqualified.

Q: Are there any hot topics in your specialty area right now?

Immigration law is fraught with controversy these days. Since September 11, we've seen a combined hysteria about national security issues and a slipping economy. This led to the public and lawmakers limiting their focus to border protection and employment restrictions without working out comprehensive immigration reform. We regularly deal with policy changes and statute changes, trying to work within the system to help our clients.

CONTINUED ON NEXT PAGE

Bruno's Top Tips for Tip Top Trust Accounting

BY BRUNO DEMOLLI

**Each quarter, Staff Auditor Bruno DeMolli reports to the Ethics Committee on his findings while auditing lawyers' trust accounts during the preceding quarter. The purpose of this column is to share Bruno's observations with the general membership of the bar. If there is a question about trust accounting that you would like answered, please direct your inquiry to "Bruno's Tips" c/o Alice Mine at the State Bar mailing address or amine@ncbar.com.*

Getting Reconciled to Reconciliation

In 1985, I was hired by the NC State Bar as staff auditor for its new program to randomly audit the trust accounts of lawyers. Over the 20 years that I have been with the State Bar, many things have changed, including the facade of the State Bar building, the sophistication of the tools that we use to do our jobs, and the executive director, but one thing has remained constant: the failure of lawyers to reconcile their trust accounts on a quarterly basis as required by the Rules of Professional Conduct.

Common Sense?

Why is the failure to reconcile the trust account at least quarterly as required by Rule 1.15-3(c) still the most common deficiency found during a procedural audit? After 20 years, I do not know the answer. Common sense tells us that to manage a personal checking account we must balance the check book at least quarterly—and most people do it on a monthly basis so as not to fall behind. A good lawyer would never counsel a client in charge of an estate account or a guardianship account to let the recordkeeping go for a quarter or two. Obviously, quarterly reconciliation is the minimum standard necessary to promote accurate accounting for client funds. I can only conclude that lawyers are simply unwilling to take the time necessary to properly oversee and manage their trust accounts. There are probably thousands of excuses for this foolhardy behavior—such as "I'm too busy," "I'm too busy," "I'm too busy." But how can you be too busy to handle with care the one aspect of the practice of law that routinely leads to suspensions and disbarments for failure to comply with the trust accounting rules?

Easy Peasy

Reconciliation of the trust account does not require an understanding of advance calculus or even basic algebra. All it requires are the same skills that are used to "balance" or reconcile your checking account bank statement with the balance showing in your checkbook. It is accomplished by ensuring that the current bank balance for the trust account coincides with the total of current balances indicated on the client ledger cards. Once a quarter, the individual balances for every client, as shown on the ledger of the general trust account, must be totaled and this total reconciled with the current bank balance of the trust account as a whole. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. The cut off date for the bank statement and the trust account balance must be the same or the two balances may not reconcile.

For recordkeeping purposes, the trust account reconciliation statement should list each client's name and current balance, the total of all client balances, and the current bank balance for the period. Adding machine tapes are acceptable as reconciliation reports if client names are listed next to their respective balances on the tape. Worksheets and adding machine tapes used to draft reconciliation reports should be retained for the six-year record keeping period required by Rule 1.15-3(f).

Reconcile yourself to reconciliation on at least a quarterly basis, and preferably on a monthly basis, and you will soon find that you sleep better at night. ■

Bruno DeMolli is the staff auditor for the North Carolina State Bar.

Who's Next?

Judicial districts randomly selected for audit during the last quarter of 2005 are Judicial District 1 (consisting of Camden, Chowan, Currituck, Dare, Pasquotank, and Perquimans counties) and Judicial District 26 (Mecklenburg County).

Specialization (cont.)

We have many family members and employers wondering why it is so difficult to bring someone into this country legally. A big issue for immigration lawyers and employers of foreign nationals are the reduced number of visas for foreign workers. Each year the number of professional visas is exhausted leaving employers scrambling for qualified workers. Family-based visa categories also have long waiting periods, which cause family members to be separated for several years.

Q: How does specialization benefit the public? The profession?

It provides a measuring standard. It helps a person to evaluate a name they were given or found in the yellow pages. It raises the level of professionalism among the lawyers who choose this type of work, and it provides a mark of the lawyer's seriousness about the practice area. It provides an outward sign of the commitment to being competent.

Q: What would you say to encourage other lawyers to pursue certification?

I would encourage other lawyers to work toward the goal of becoming a certified specialist. It enables someone to say "I care about what I do and I'm committed to it. Here's proof of that." ■

I'm Back

By L. Thomas Lunsford II

Did you miss me? After a brief hiatus I am, comfortable as an old shoe, back underfoot, spooning up the unique brand of fanciful reportage that was once mine alone but is now the staple of network news, reality television, and, occasionally, the *New York Times*. As always, I stand ready to protect my sources, and if necessary, to go to jail, should anyone ever choose to confide in me. And, of course, I am ready to apologize if, after having reported something bogus, it appears that I have erred by trusting my sources rather relying on my own imagination. In any event, I'm back.

I didn't write anything for attribution last year, fearing that by commenting on the primary subject that interested me, the prosecution of the prosecutors, I would be readily identified and dismissed as an emotional defender of and apologist for the State Bar's disciplinary staff. Happily enough, from my standpoint, a much more credible report than I could have produced appeared in this publication last summer and confirmed that which I had always known in my head and my heart: that our lawyers, in spite of their imperfect handling of the matter in question, did a decent and honorable job of prosecuting the case. The proceedings of the State Bar's Disciplinary Review Committee, which issued that report, also led me to consider several other things that may ultimately warrant examination in this column, such as, the importance of public relations to agencies like the State Bar, the galvanizing power and defamatory potential of email communication, the enormous emotional content of the death penalty issue, and the overarching significance of the "cause" for opponents and proponents alike, the fact that justice in disciplinary cases, as in other adjudications, is as much a process as a product, and the sense of many in the criminal defense bar that the justice system is biased against them and the interests they serve.

There is, of course, another reason to start writing this column again. Recent events seem to indicate that pithy observations in a bar journal are now considered as good and sufficient evidence of one's suitability for appointment to the Supreme Court. Although I continue to enjoy my work here at the State Bar, I do from time to time wonder whether the country needs me to resolve some of the more troublesome constitutional issues that keep cropping up. Certainly my writing on such matters as the State Bar's budget and the Andy Griffith Show has attracted the notice of those responsible for selecting and evaluating judicial nominees. It has also engendered a cottage industry among legal scholars who seek from these articles insight into my "judicial philosophy," and clues as to how I might rule on abortion. Realizing that breadth of apparent knowledge may be more important than actual understanding to the members of the Senate's Judiciary Committee, I thought that it might enhance my credentials as a possible nominee if I touched on several subjects superficially in this column, rather than one or two in depth. Accordingly, I will now proceed to highlight an array of recent financial developments in the life of the State Bar, without "prejudging" anything that might come before me later on the Court.

At its meeting on October 21, 2005, the council determined that the amount of the annual membership fee (dues) for

2006 will be $235, or $35 more than was charged in 2005. The State Bar's financial projections indicate that an increase of this magnitude should be sufficient to finance the agency's operations at current levels through at least 2009. The increase was enabled by an amendment to G.S. 84-24 enacted by the General Assembly at its most recent session. That amendment authorized the council to set dues in appropriate amounts not to exceed $300 annually, the previous ceiling being $200. It is anticipated that the total authority, which will be exercised incrementally over time, should be adequate to fund the State Bar's foreseeable needs for a decade or more. Of course, the advent of new programs, additional unfunded regulatory responsibilities, hyperinflation, or protracted litigation could upset these calculations. Who knows what the economy will be like in ten years, or how someone like me would construe the commerce clause?

In addition to the annual membership fee, North Carolina's lawyers are now liable to pay to the State Bar (for transmission to the State Board of Elections) a $50 "surcharge" to finance campaigns for appellate judicial office. This law, which was not sought by the State Bar and will not benefit the agency, was enacted in the waning days of the legislative session as a feature of the budget bill. It is presently the subject of a constitutional challenge in federal court. Among the most reluctant defendants are members of the State Bar's Administrative Committee, the committee that is responsible for enforcing the membership requirements. They are represented by the attorney general, as is the State Board of Elections. At the council's meeting it was decided that the attorney general would be asked to file a motion requesting the court to excuse the State Bar defendants from active participation in the case, recognizing that the State Bar did not seek the legislation, is neutral on the legal and public policy questions involved, has no responsibility other than collecting the money, is possessed of no relevant discoverable information, and is, of course, quite willing to be bound by whatever the court or the jury ultimately decides. It is hoped that a favorable ruling on this motion will avoid possible liability for attorneys fees and obviate the necessity of the Bar's taking a position in a case with respect to which no consensus appears to exist within the membership. The council has also determined that the surcharge will be billed separately from the annual membership fee, probably next April. This will be more convenient administratively, and will allow for the possibility that an early end to the litigation favorable to the plaintiffs may eliminate the need for invoicing and other expensive collection efforts. Meanwhile, I will personally remain mute on the underlying constitutional question—although I certainly know the answer-so as to make sure that I don't fail any "litmus test" associated with the matter.

With further regard to money and bills you are likely to receive from the State Bar, there is also the matter of the Client Security Fund. Based upon a comprehensive analysis of the fund's financial situation, including pending and foreseeable claims, the council, upon the board's recommendation, decided to advise the Supreme Court that it would be appropriate to set the coming year's assessment in support of the fund at $50 per active member, the same as in 2005. It had been hoped that circumstances would be such that next year's assessment could be reduced, possibly to the $20 level that persisted through most of the past decade. Unfortunately, claims of unprecedented magnitude in 2005, leading to a record payout of over $940,000, appear to require the more substantial impost. The assessment, in whatever amount approved by the Court, will be invoiced along with the annual membership fee in early December. Before leaving this topic I should make clear that I believe, fundamentally, that courts ought simply to construe the law, rather than make it. However, I will be bold to say to the ABA's Standing Committee on the Federal Judiciary, at my yet to be scheduled interview, that our North Carolina Supreme Court well served the profession and the public when in the exercise of its inherent power it created the Client Security Fund.

Also on the subject of money, I should note that the legislature recently approved the imposition of a small fee payable to the State Bar by lawyers from other states who seek admission *pro hac vice* in North Carolina. Under G.S. 84-4.1 as amended, petitioners are being required to pay $25 to the State Bar each time they apply for limited admission. The revenue generated by this new fee is intended to support the implementation of a registration scheme that would enable the Bar to keep closer tabs on the ever increasing group of out-of-state attorneys admitted *pro hac vice.* Since such lawyers must agree to submit to our disciplinary jurisdiction, the fee will also subsidize in a small way the administration of the disciplinary program. Proposed rules providing for registration of lawyers admitted *pro hac vice* are published for comment in this issue of the *Journal.* In reviewing those proposals, please note that it is contemplated that it would be the responsibility of the North Carolina lawyer with whom the out-of-state lawyer is associated in the matter to see that the required registration statement is timely filed. These proposed rules will be finally considered at the council's next meeting in January, when they will get the same "up or down" vote to which I, as a Supreme Court nominee, would be entitled.

Finally, for those who subscribe to the idea that it is more blessed for the government to give than receive, I would like to point out that the State Bar expects to have more money to give away in the near future. Another bill enacted in the last days of the session invested the State Bar with authority to distribute one half of the "unpaid residuals" from class action lawsuits to support the "provision of civil legal services for indigents." In October the council decided to ask the IOLTA Board of Trustees to administer any such funds and to distribute them through its existing grant making process. The board was happy to oblige. It is unclear at present how much money may be involved, but whatever the amount, it will all go to increase access to justice, since neither State Bar nor IOLTA will receive any reimbursement of administrative cost. And speaking of access to justice, I'd like to go on record, as I have so many times before in these pages, and tell you that if nominated and confirmed, I will make sure that the six people who actually noticed that my column was missing from the *Journal* during the last year will always have access to Justice Lunsford. ■

L. Thomas Lunsford II is the executive director of the North Carolina State Bar.

Attorneys Receive Professional Discipline

Disbarments

Two attorneys surrendered their law licenses to the council of the NC State Bar and were disbarred on October 21, 2005. Charlotte attorney **James E. Ferguson III** was convicted of felony charges of mail fraud, wire fraud, and bank fraud. **Richard W. Rutherford** of Raleigh admitted misappropriating client funds.

Partners **Michael King** and **DuMont Stockton** of East Spencer were disbarred in late August 2005. The Disciplinary Hearing Commission found, among other things, that King and Stockton misappropriated client funds and engaged in various trust account rule violations. The commission also found that King prepared false HUD-1 settlement statements and disbursed funds other than as directed by the HUD-1 statements.

Tiffany Bryan, who formerly practiced in Cary, surrendered her law license and was disbarred by the DHC on September 14, 2005. Ms. Bryan falsely reported to her former law firm that she had incurred billable time and various expenses on behalf of a client, knowing that the client would be billed for the time and expenses.

Eric Parham was disbarred following a hearing on October 7, 2005. The DHC found that he neglected a number of client matters and endorsed a check made payable to a client and distributed a portion of the funds without proper authorization. Parham lives in Orange County.

Angela Seabrooks, who formerly practiced in Greensboro, surrendered her law license to the DHC and was disbarred on October 5, 2005. She embezzled client funds.

Suspensions & Stayed Suspensions

The law license of **Rodney Toth**, who formerly practiced in Charlotte, was suspended for 90 days for neglecting client matters and technical trust account violations. The suspension was stayed for three years on various conditions. Toth currently lives in Florida.

Following a hearing in August 2005, the DHC suspended the law license of Charlotte attorney **Tom Tillett** for three years, with the right to apply for a stay of the suspension after one year. The commission found that Tillett misappropriated client funds on one occasion, prepared a false HUD-1 statement, and engaged in other ethical violations. The Office of Counsel has filed a motion pursuant to N.C. Civ. Pro. Rule 59, asking the commission to reconsider the order of discipline, as disbarment is ordinarily imposed when an attorney embezzles client funds.

Williamston attorney **Milton E. Moore** was disciplined by the Disciplinary Hearing Commission following a hearing on August 19, 2005. The DHC found that Moore failed to return fees as ordered by an administrative law judge in two Social Security cases and submitted a brief in a federal case that did not comply with the rules of federal practice. Moore's law license was suspended for four years and he may apply for a stay of the rest of the suspension after two years, provided he complies with certain conditions. Mr. Moore has substantial prior professional discipline.

The law license of Danbury attorney **R. Michael Bruce** was suspended for two years, and the suspension was stayed for three years upon compliance with various conditions, pursuant to a consent order entered by the Disciplinary Hearing Commission on Septembers 17, 2005. Bruce failed to file personal income tax returns on a timely basis.

The DHC suspended the law license of Marshall attorney **Durryl Taylor** for five years following a hearing on August 11, 2005. Taylor may apply for a stay of the balance of the sentence after two years, provided he complies with certain conditions. Taylor neglected client matters, failed to communicate with his clients, failed to respond to notices of mandatory fee dispute resolution, and engaged in other violations of the Rules of Professional Conduct.

James E. Hairston Jr., who practices in Durham, was disciplined in October 2005 for failing to file timely state income tax returns for several years. Hairston consented to the order of discipline, which suspended his law license for two years, and stayed the suspension for three years on various conditions.

The law license of Wake County attorney **Aaron Carlos** was suspended for two years, and the suspension was stayed for three years for neglecting several client matters during his tenure as an assistant appellate defender and misleading his supervisor about the status of the cases. The order in the case was entered by consent on August 22, 2005.

Censures

Raleigh attorney **James R. Vann** was censured by the DHC following a hearing on September 1, 2005. The DHC found that Vann created false evidence regarding communications with a client regarding a Uniform Commercial Code filing and lied about the incident to the State Bar Grievance Committee.

Reprimands

The State Bar voluntarily dismissed a formal disciplinary complaint against **Jeffrey Starkweather** of Chatham County in October 2005 after Starkweather agreed to accept the original discipline imposed upon him earlier in the year by the Grievance Committee. The committee reprimanded Starkweather for neglecting a client matter and failing to respond to a letter of notice and subpoena issued to him by the State Bar.

Zephyr Teachout was reprimanded for failing to keep the court and opposing

CONTINUED ON PAGE 57

Amendments Approved by the North Carolina Supreme Court

At a conference on August 18, 2005, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

Rules on Accreditation of Paralegal Education Courses

27 N.C.A.C. 1G, Section .0200, Rules Governing Continuing Paralegal Education

The new rules set forth the standards and procedure for the Board of Paralegal Certification to accredit continuing education courses for paralegals.

Rule 4.4 of the Rules of Professional Conduct

27 N.C.A.C. 2, Rule 4.4, Respect for Rights of Third Persons

The amendment to Rule 4.4 limits a lawyer's duty upon receiving a document that was inadvertently sent to notification of the sender if the document relates to the representation of a client. The amendment to the comment explains that whether a lawyer is required to return the document to the sender is a matter of law.

Amendments Pending Approval of the Supreme Court

At its meetings on October 21, 2005, the council voted to approve the following amendments for transmission to the North Carolina Supreme Court for approval.

Amendments to CLE Requirements for Video Replays

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The CLE accreditation rules required that a minimum of five persons attend a prerecorded CLE program. The proposed amendments clarify that this is a registration requirement rather than an attendance requirement and reduce the number of required registrants to three.

New Specialty in Social Security Disability Law

27 N.C.A.C. 1D, Section .2900, Certification Standards for the Social Security Disability Law Specialty

Upon the recommendation of the Board of Legal Specialization, the council authorized a specialty in Social Security disability law. By identifying lawyers with knowledge and experience in this area of practice, claimants will be better able to obtain qualified counsel. The standards for certification are comparable to the standards for the other areas of specialty certification.

Amendments to The Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, Certification of Paralegals

The amendments address several matters that were overlooked in the original plan for certification of paralegals and do the following: provide a procedure whereby paralegals serving on the board and on the certification committee may themselves be certified; permit the board, with the approval of the council, to set and waive fees; allow work as a paralegal educator to satisfy the work experience requirement for certification; and clarify the requirements and the procedure for the board's determination that an educational program is a "qualified paralegal studies program."

Rules of Professional Conduct, Rule 1.13, Organization as Client

27 N.C.A.C. 2, The Rules of Professional Conduct

Rule 1.13 is amended to incorporate some, but not all, of the changes that the ABA made to Model Rule 1.13 last year in response to issues of professional responsibility that arose out of financial scandals at a number of large, publicly traded, national corporations and in response to the Sarbanes Oxley Act of 2002 and the SEC regulations adopted pursuant thereto. The revised rule establishes when an organization's lawyer must report misconduct of the organization's constituents to higher authorities within the organization and clarifies that a lawyer is allowed to disclose confidential corporate information only to the extent permitted by the existing exceptions to the duty of confidentiality in Rule 1.6.

Rules of Professional Conduct, Rule 3.4, Fairness to Opposing Party and Counsel and Rule 3.8, Special Responsibilities of a Prosecutor

27 N.C.A.C. 2, The Rules of Professional Conduct

Rule 3.4(d), the rule on fairness in both civil and criminal trial advocacy, is amended to add that after making reasonably diligent inquiry, a lawyer must comply with any duty to disclose evidence or information in pretrial procedure. The amendment to Rule 3.8(d) requires a prosecutor to make "reasonably diligent inquiry" prior to making timely disclosure of all evidence or information that must be disclosed pursuant to law.

Proposed Amendments

At its meeting on October 21, 2005, the council voted to publish following proposed rule amendments for comment from the members of the bar.

Proposed Amendments to The Discipline and Disability Rules

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The Disciplinary Hearing Commission recommends the amendment of the Rule .0114 of the Discipline and Disability Rules to extend the time within which the initial date of a hearing may be set and to widen the window of available dates. This will help to alleviate the need to continue cases because of the time constraints imposed by the current rule requiring that the case be scheduled 60 to 90 days after service.

The proposed changes to Rule .0117 make the effective date for an order of disbarment for a surrender of a law license to the Disciplinary Hearing Commission consistent with the effective date for such an order upon surrender of a law license to the council. The proposed amendments also clarify that, under either method of surrender, the wind-down period is 30 days after the filing of the affidavit of surrender regardless of the effective date of the order of disbarment.

.0114 Formal Hearing

(a) . . . .

(d) Within ~~14~~ 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than ~~60~~ 90 nor more than ~~90~~ 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than ~~60~~ 90 nor more than ~~90~~ 150 days from the date of service of the last complaint upon the defendant. **By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.**

(e) . . . .

.0117 Surrender of License While Under Investigation

(a) . . . .

(d) If a defendant against whom a formal complaint has been filed **before the commission** wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out **in .0117(a)(1), (2), (3), and** (4) above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective ~~30 days after service~~ **upon entry** of the order ~~upon the defendant~~ **with the secretary**. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days **of the tender or consent**. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

Proposed Amendments to CLE Rules

27 N.C.A.C.1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

The proposed amendment will allow members until July 31 of the current year to reopen and adjust their official CLE record for the prior year provided good cause is shown.

.1522 Annual Report and Compliance Period

(a) Annual Written Report. Commencing in 1989, each active member of the North Carolina State Bar shall provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar. Upon receipt of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record **unless, on or before July 31 of the year in which the report form is mailed to members, the member shows good cause for adjusting the**

The Process

Proposed amendments to the Rules and Regulations of the North Carolina State Bar are published for comment in the *Journal.* They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send a written response to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

member's continuing legal education record for the preceding year.

Proposed Amendments to The Plan for Certification of Paralegals

27 N.C.A.C., 1G, Section .0200, Rules Governing Continuing Paralegal Education

The Board of Paralegal Certification recommends amendments to the rules on accrediting continuing education programs for paralegals to permit a minimum of three certified paralegals to register to attend a video replay of a CPE program and to provide that CPE credit can be obtained on-line without limitation.

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(1) . . . .

(3) A certified paralegal may receive credit ~~Credit may be given~~ for continuing education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. A minimum of ~~five~~ three certified paralegals must ~~physically attend~~ register to attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(4) A certified paralegal may receive credit for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based CLE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(5) ~~(4)~~ . . . [renumbering the remaining paragraphs].

Proposed Amendments to Provide for the Registration of Attorneys Appearing Pro Hac Vice

27 N.C.A.C. 1H, Registration of Attorneys Appearing Pro Hac Vice

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

A proposed new subchapter and proposed amendments to the procedures for the administrative committee require the filing of a registration statement on behalf of anyone admitted to practice in a North Carolina court *pro hac vice*. The registration statement must be filed by the North Carolina bar member who is associated on the matter pursuant to G.S. 84-4.1, and failure to file in a timely manner shall be grounds for administrative suspension. Subchapter 1H is entirely new and, therefore, does not appear in bold, underlined print.

27 N.C.A.C. 1H, Section .0100 Registration Procedure

.0101 Registration

(a) Whenever an out-of-state attorney (the admittee) is admitted to practice *pro hac vice* pursuant to G.S. 84-4.1, it shall be the responsibility of the member of the North Carolina State Bar who is associated in the matter (the responsible attorney) to file with the secretary a complete registration statement verified by the admittee. This registration statement must be submitted within 30 days of the court's order admitting the admittee upon a form approved by the council of the North Carolina State Bar.

(b) Failure of the responsible attorney to file the registration statement in a timely fashion shall be grounds for administrative suspension from the practice of law in North Carolina pursuant to the procedures set forth in Rule .0903 of subchapter D of these rules.

(c) Whenever it appears that a registration statement required by paragraph (a) above has not been filed in a timely fashion, notice of such apparent failure shall be sent by the secretary to the court in which the admittee was admitted *pro hac vice* for such action as the court deems appropriate.

27 N.C.A.C. 1D, Section .0900 Procedures for Administrative Committee

.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs, or Failure to File Certificate of Insurance Coverage or *Pro Hac Vice* Registration Statement

(a) Notice of Overdue Fees, Costs, ~~or~~ Certificate of Insurance Coverage, or *Pro Hac Vice* Registration Statement. Whenever it appears that a member has failed to comply, in a timely fashion, with the rules regarding payment of the annual membership fee, late fee, the Client Security Fund assessment, and/or any district bar annual membership fee, or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a notice of the secretary or the council of the North Carolina State Bar or that the member has failed to file, in a timely fashion, a certificate of insurance coverage as required in Rule .0204 of or a *pro hac vice* registration statement as required in Rule .0101 of subchapter H of these rules subchapter A of these rules, the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) when appropriate, demanding payment of a $30 late fee for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a timely fashion, and/or failure to submit a certificate of insurance coverage in a timely fashion.

(b) Service of the Notice

. . . .

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) or Rule .0204(c) of subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or it appears that the member has failed to file a certificate

CONTINUED ON PAGE 55

Committee Takes No Position on Inquiry on Hiring Independent Title Search Company

At a meeting on October 21, 2005, in the absence of a majority vote of all members of the committee as required by the Procedures for Ruling on Questions of Legal Ethics, 27 N.C.A.C. 1D, Section .0100, no action was taken and no opinion will be henceforth proposed by the committee on the inquiry that was previously designated *Proposed 2004 FEO 12, Hiring an Independent Title Search Company.*

Council Actions

At a meeting on October 21, 2005, the State Bar Council adopted the opinions summarized below upon the recommendation of the Ethics Committee.

2005 Formal Ethics Opinion 1

Appearance Before Judge Who is a Family Member

Opinion rules that a lawyer may not appear before a judge who is a family member without consent from all parties and, although consent is not required, the other members of the firm must disclose the relationship before appearing before the judge.

The Ethics Committee revised footnotes that appear at the end of this opinion. The footnotes define "close relative" and clarify that the duty to disclose the relationship does not arise in the absence of knowledge of the relationship. The committee concluded that the revisions were not substantive and recommended adoption without republication.

2005 Formal Ethics Opinion 6

Compensation of Nonlawyer Employee Who Represents Social Security Claimants

Opinion rules that the compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

2005 Formal Ethics Opinion 7

Recommending Services of a Third Party to Bankruptcy Client

Opinion rules that an attorney may recommend that a prospective client use a computer in the attorney's office and the services of an internet-based company to complete a required bankruptcy certification form.

2005 Formal Ethics Opinion 8

URL for Firm Website is Trade Name and Must Register with Bar

Opinion rules that the URL for a law firm website is a trade name that must register with the North Carolina State Bar and meet the requirements of Rule 7.5(a).

Ethics Committee Actions

At its meeting on October 21, 2005, the committee agreed that Proposed 2005 FEO 4, *Disclosure of the Confidences of Parent Seeking Representation for Minor*, and Proposed 2005 FEO 5, *Communications with Government Entity Represented by Counsel*, should be sent to subcommittees for further study. New opinions proposed by the committee appear below. The comments of readers are welcomed.

Proposed 2005 Formal Ethics Opinion 9
Lawyer for Publicly Traded Company May "Report Out" Pursuant to SEC Regulations
October 20, 2005

Proposed opinion rules that a lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

Note: This proposed opinion relies upon Rule 1.13 as amended by the council on October 21, 2005. The amended rule is waiting for final approval of the North Carolina Supreme Court.

Background:

Section 307 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. §7245 ("SOX §307") required the Securities and Exchange Commission (the Commission) to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC including a rule

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate reme-

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any such request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, prior to the next meeting of the committee in January 2006.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

dial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

In response to this directive, the Commission adopted Rule 205, *Standards for Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer*, which became effective on August 5, 2003, 17 C.F.R. Part 205 ("Rule 205"). Section 205.3 of Rule 205 sets forth the duty of an attorney appearing and practicing before the Commission to report evidence of a material violation of securities law or breach of fiduciary duty to the chief legal officer and chief executive officer of the client company and, if an appropriate response is not forthcoming, to the audit committee of the board of directors or to the board itself (commonly referred to as "reporting up"). Paragraph (d)(2) of section 205.3 contains a provision permitting, but not requiring, what is commonly referred to as "reporting out" as follows:

> (2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Section 205.6 of Rule 205 addresses sanctions and discipline. Paragraph (c) provides:

> (c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

Inquiry:

Have the duties of a North Carolina attorney under the Rules of Professional Conduct been affected by the regulations promulgated by the Securities and Exchange Commission under Section 307 of the Sarbanes-Oxley Act of 2002, which authorize a lawyer to disclose confidential or privileged information of a publicly traded company under certain circumstances?

Opinion:

A North Carolina attorney who represents or is employed by a publicly traded company and who appears and practices before the Commission faces a potential dilemma. Pursuant to Rule 205, under certain circumstances such an attorney *may* disclose or "report out" corporate confidential information relative to a material violation of securities law, breach of fiduciary duty, or similar violation by the corporation. Nevertheless, under Rule 1.13(c) of the North Carolina Rules of Professional Conduct, an attorney for any organization, whether it is a publicly traded company or not, who has fulfilled the duty set forth in Rule 1.13(a) to report internal misconduct to the highest authority for the organization and the highest authority insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, may reveal confidential client information outside the organization only to the extent permitted by Rule 1.6, the confidentiality rule (Rule 1.13 and Rule 1.6 collectively are referred to as the "NC Rule"). In this situation, disclosure outside the organization might be permitted by Rule 1.6(b)(2), which allows disclosure of client confidences to prevent the commission of a crime by the client, or Rule 1.6(b)(4), which permits disclosure of client confidences to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the attorney's services were used. However, in the rare instances that the activity that a North Carolina attorney desires to disclose pursuant to Rule 205 does not involve a crime or the attorney's services were not used to advance the activity, the attorney may not know whether he or she faces professional discipline if the attorney chooses to "report out."

The potential conflict between Rule 205 and the NC Rule raises the question of whether the NC Rule is preempted by Rule 205. A federal regulation validly promulgated carries the force of federal law, with no less preemptive effect than federal statutes. *Fidelity Federal v. de la Cuesta*, 458 U.S. 141 (1982). According to *de la Cuesta*, the questions upon which resolution of preemptive effect of a regulation rests is whether the agency means to preempt state law, and if so, whether that action is within the scope of the agency's delegated authority. *de la Cuesta* at 154. The Commission's intention to preempt state ethics rules conflicting with Rule 205 is unambiguous. In its letter discussing the implementation of the final version of Rule 205, the Commission states:

> The language we adopt today clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.[1]

In determining whether the regulation is validly promulgated, the courts are directed by the Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 457 U.S. 837 (1984) to conduct a two-prong inquiry. First, the court must determine whether Congress has directly spoken

on the precise question at issue (the "First Prong"). However, if Congress has not addressed the precise issue and the statute is ambiguous, then the question is whether the agency's interpretation of the statute and the regulation promulgated is based on permissible construction of the statute (the "Second Prong"). SOX §307 mandates the Commission to require "reporting up" in its regulations There is no provision in SOX, however, that expressly authorizes the Commission to adopt "reporting out" regulations. Good faith arguments can be made for both propositions, i.e., that SOX does, and does not, implicitly grant such authority to the Commission.

It has been argued that there is no conflict between Rule 205 and the North Carolina Rules. Because Rule 205 is permissive, the argument goes, one can comply with a more stringent state requirement while not offending federal law, i.e. compliance with both regulatory regimes is not a "physical impossibility." Once again, *de la Cuesta* is instructive. In that case, the court noted that the more stringent state law effectively created an obstacle to the achievement of "the full purposes and objective" of the federal regulation. Following the reasoning in *de la Cuesta*, the NC Rule undeniably impinges on the flexibility provided by Rule 205, and a reviewing court would likely hold that if Rule 205 was validly promulgated, it preempts the NC Rule.

It is beyond the capacity of an ethics opinion to determine whether or not the "reporting out" provision of Rule 205 was validly promulgated. Therefore, unless and until the Fourth Circuit Court of Appeals or the US Supreme Court determines that Rule 205 was not validly promulgated, (a) there will be a presumption that Rule 205 was promulgated by the Commission pursuant to a valid exercise of authority and (b) a North Carolina attorney may, without violating the North Carolina Rules of Professional Conduct, disclose confidential information as permitted by Rule 205 although such disclosure would not otherwise be permitted by the NC Rule.

Endnote

1. US Securities & Exchange Commission, Final Rule: Implementation of Standards of Conduct for Attorneys, Release Nos. 33-8185, 34-47276, IC-25929, republished in Practicing Law Institute, Corporate Law and Practice Course Handbook Series 489, 494 (May 2005).

Proposed 2005 Formal Ethics Opinion 10
Virtual Law Practice and Unbundled Legal Services
October 20, 2005

Proposed opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

Inquiry #1:

Law Firm markets and provides legal services via the internet under the name Virtual Law Firm (VLF). VLF plans to offer and deliver its services exclusively over the internet. All communications in the virtual law practice are handled through email, regular mail, and the telephone. There would be no face-to-face consultation with the client and no office in which to meet.

May VLF lawyers maintain a virtual law practice?

Opinion #1:

Advertising and providing legal services through the internet is commonplace today. Most law firms post websites as a marketing tool; however, this opinion will not address passive use of the internet merely to advertise legal services. Instead, the opinion explores use of the internet as an exclusive means of promoting and delivering legal services. Many lawyers already use the internet to offer legal services, answer legal questions, and enter into client-lawyer relationships. While the Rules of Professional Conduct do not prohibit the use of the internet for these purposes, there are some key concerns for cyberlawyers who use the internet as the foundation of their law practice. Some common pitfalls include 1) engaging in unauthorized practice (UPL) in other jurisdictions, 2) violating advertising rules in other jurisdictions, 3) providing competent representation given the limited client contact, 4) creating a client-lawyer relationship with a person the lawyer does not intend to represent, and 5) protecting client confidences.

Advertising and UPL concerns are endemic to the virtual law practice. Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. *See* South Carolina Appellate Court Rule 418, "Advertising and Solicitation by Unlicensed Lawyers" (May 12, 1999)(requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers). Advertising and UPL restrictions vary from state to state and the level of enforcement varies as well. At a minimum, VLF must comply with North Carolina's advertising rules by including a physical office address on its website pursuant to Rule 7.2(c). In addition, VLF should also include the name or names of lawyers primarily responsible for the website and the jurisdictional limitations of the practice. Likewise, virtual lawyers from other jurisdictions, who actively solicit North Carolina clients, must comply with North Carolina's unauthorized practice restrictions. *See* N.C. Gen. Stat. § 84-4. 2.1. In addition, a prudent lawyer may want to research other jurisdictions' restrictions on advertising and cross-border practice to ensure compliance before aggressively marketing and providing legal services via the internet.

Cyberlawyers also tend to have more limited contact with both prospective and current clients. There will rarely be extended communications, and most correspondence occurs via email. The question becomes whether this limited contact with the client affects the quality of the information exchanged or the ability of the cyberlawyer to spot issues, such as conflicts of interest, or to provide competent representation. *See generally* Rule 1.1 (requiring competent representation); Rule 1.4 (requiring reasonable communication between lawyer and client). Will the cyberlawyer take the same precautions (i.e., ask the right questions, ask enough questions, run a thorough conflicts check, and sufficiently explain the nature and scope of the representation), when communications occur and information is exchanged through email?

While the internet is a tool of convenience and appears to respond to the consumer's need for fast solutions, the cyberlawyer must still deliver competent representation. To this end, he or she should make every effort to make the same inquiries, to engage in the same level of communication, and to take the same precautions as a competent lawyer does in a law

office setting.

Next, a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis.

Finally, cyberlawyers must take reasonable precautions to protect confidential information transmitted to and from the client. RPC 215.

Inquiry #2:

VLF offers its legal services to *pro se* litigants and small law firms seeking to outsource specific tasks. VLF aims to provide more affordable legal services by offering an array of "unbundled" or discrete task services. Unbundled services are legal services that are limited in scope and presented as a menu of legal service options from which the client may choose. In this way, the client, with assistance from the lawyer, decides the extent to which he or she will proceed *pro se*, and the extent to which he or she uses the services of a lawyer. Examples of unbundled services include, but are not limited to, document drafting assistance, document review, representation in dispute resolution, legal advice, case evaluation, negotiation counseling, and litigation coaching. Prior to representation, VLF will ask that the prospective client sign and return a limited scope of representation agreement. The agreement will inform the prospective client that VLF will not be monitoring the status of the client's case, will only handle those matters requested by the client, and will not enter an appearance on behalf of the client in his or her case.

May VLF lawyers offer unbundled services to clients?

Opinion #2:

Yes, if VLF lawyers obtain informed consent from the clients, provide competent representation, and follow Rule 1.2(c). The Rules of Professional Conduct permit the unbundling of legal services or limited scope representation. Rule 1.2, Comment 6 provides:

> The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client....A limited representation may be appropriate because the client has limited objectives for the representation. In addition the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Rule 1.2, comment [7], however, makes clear that any effort to limit the scope of representation must be reasonable, and still enable the lawyer to provide competent representation.

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.[1]

Endnote

1. The ABA Standing Committee on the Delivery of Legal Services has created a website encouraging the provision of "unbundled" legal services and assisted *pro se* representation. The Standing Committee believes unbundling is an important part of making legal services available to people who could not otherwise afford a lawyer. The website has also has compiled a list of state ethics opinions addressing limited scope representation. *See* www.abanet.org/legalservices/deliver/delunbund.html

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Proposed 2005 Formal Ethics Opinion 11
Interim Account for Costs Associated with Real Estate Closings
October 20, 2005

Proposed opinion examines the requirements for an interim account used to pay the costs for real estate closings and also rules that the actual costs may be marked up by the lawyer provided there is full disclosure and the overcharges are not clearly excessive.

Inquiry #1:

ABC Law Firm limits its practice to residential real estate sale and refinance transactions. On a monthly basis, it processes a high volume of such transactions involving real estate in both the county where its office is located and in contiguous counties.

RPC 44 and North Carolina's Good Funds Settlement Act, Chapter 45A of the North Carolina General Statutes, prohibit disbursement of funds from a lawyer's trust account prior to recording if the lender so requires. Lenders' instructions often require the recording of documents prior to disbursement of loan proceeds.

A number of the lenders providing financing to ABC's clients require the closing lawyer to estimate the settlement charges and disbursements, including courier and recording costs, prior to the issuance of the final loan package. Once the loan package is issued, the closing lawyer is not permitted to deviate from the figures specified in the loan package because the lenders are subject to scrutiny, and potential liability, for devia-

tions between their "good faith estimate" of closing costs and the actual closing costs. Not infrequently, however, the actual costs for recording and overnight mail/couriers exceed the initial estimates.

ABC Law Firm has adopted the following procedure to address the above-described situation:

1. ABC established with its depository bank a depository account called the "Recording Account;"

2. ABC prepares for each real estate client, each of whom reviews and signs prior to closing, a closing affidavit making various disclosures, including the following:

> *I/we hereby acknowledge and agree that certain charges on my HUD-1 Settlement Statement, including but not limited to overnight/courier and recording fees, may not reflect the actual costs and in fact may be more than the actual costs to the settlement agent. The additional amount(s) may vary and are to help cover the administrative aspects of handling the particular item or service. I/we hereby consent to and accept the above-referenced up-charges.*

3. ABC marks up the estimated overnight/courier fees and recording fees it provides to lenders by anywhere from $2.00 to $15.00, and reflects the marked-up amount on the HUD-1 Settlement Statement on line 1201 denominated as "Recording Fees."

4. When the transaction closes, the amount reflected on the HUD-1 Settlement Statement as "Recording Fees" is transferred from ABC's trust account to ABC's Recording Account, and disbursements to recording offices and for reimbursement for overnight/courier fees are made from the Recording Account.

5. All amounts reflected on the HUD-1 Settlement Statement which are payable to ABC, including the Recording Fees, are reported by ABC as business income, and all disbursements from the Recording Account for overnight/courier fees and recording charges are reported as business expenses.

6. ABC considers all funds in the Recording Account to be funds of ABC, and from time to time, surplus funds are drawn from the Recording Account and transferred to the firm's Operating Account, or if necessary, funds are transferred from the Operating Account to the Recording Account.

After a closing but before the recording of the documents, may ABC transfer the amount for Recording Fees, as reflected on the HUD-1, from the law firm trust account to the Recording Account and write a check to the Register of Deeds (and courier/overnight service) against those funds to tender to the Register of Deeds when the documents are recorded?

Opinion #1:

No, unless the Recording Account is maintained as a lawyer's trust account in accordance with Rule 1.15-1 to Rule 1.15-3 of the Rules of Professional Conduct. Although the transaction has closed, the funds to cover costs of the closing, including recording and overnight/courier fees, remain client funds until disbursed and must be segregated from the lawyer's funds and be deposited and disbursed in accordance with the trust accounting rules.

As a trust account, the funds in the Recording Account would be client funds and not the funds of ABC. Funds could not be transferred from the Recording Account to the firm's operating account unless earned by the firm or payable to the firm as reimbursement for costs advanced.

Inquiry #2:

ABC does not want the Recording Account to be a trust account. Therefore, ABC deposits its own money into the Recording Account. Checks for the recording and overnight/courier fees for a closing are written from this account. At closing, the line item for these closing costs on the HUD-1 reflects payment to the law firm to reimburse the firm for advancing these costs. After the closing and the recording of the documents, ABC deposits the check to the firm from the closing into the Recording Account to reimburse the firm for advancing the funds to cover these costs. Does this procedure comply with the trust accounting rules?

Opinion #2:

Yes. Because the Recording Account contains only the funds of the law firm, it does not have to be maintained as a lawyer's trust account.

Inquiry #3:

ABC would like to avoid advancing the funds of the law firm to cover the recording and courier/overnight fees. If the closing lawyer tenders a firm trust account check, written against the loan proceeds on deposit in the trust account, to the Register of Deeds at the time that the documents are recorded, has the lawyer complied with the lender's requirement that documents be recorded before the loan proceeds are disbursed?

Opinion #3:

Yes.

Inquiry #4:

The Fourth Circuit in *Boulware v. Crosland Mortgage*, 291 F.3d 261 (4th Cir. 2002), the Seventh Circuit in *Krzalic v. Republic Title Company*, 314 F.3d 875 (7th Cir. 2002), and the Eighth Circuit in *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003) have all ruled that "up charges," or markup, by mortgage lenders and settlement agents for recording fees and other expenses of settlement is not a violation of the Federal Real Estate Settlement Procedures Act.

If there is disclosure to its clients as set forth in Inquiry #1 above, may ABC inflate its estimate of the costs for recording and overnight/couriers fees that will be incurred in closing a transaction and, if the actual costs prove to be less than the estimated costs, retain the overcharges?

Opinion #4:

Yes, provided this practice is not prohibited by law, the disclosure is made to the lender as well as the seller, the overcharges are not clearly excessive in violation of Rule 1.5(a), and the clients are not misled, in violation of Rule 8.4(c), about the fact that the overcharges will be kept by the law firm as profit.

Proposed 2005 Formal Ethics Opinion 12
Payment of Legal Fees By Third Parties
October 20, 2005

Proposed opinion explores a lawyer's obligation to return legal fees when a third party is the payor.

Inquiry #1:

Lawyer receives a $5,000 advance fee from Client in a domestic case. After Lawyer expended $2,000 in fees, Lawyer receives a

telephone call from "Ronnie," who says Client stole the $5,000 from him and he wants it back. Lawyer confronts Client, who denies having stolen the money or even knowing Ronnie.

What is Lawyer's ethical obligation with respect to the $5,000?

Opinion #1:

A lawyer may not accept funds the lawyer knows to be obtained illegally or fraudulently. *See* Rule 8.4. In the above inquiry, however, Lawyer has no actual knowledge that the funds were stolen. Ronnie could be an interloper. Without knowledge to the contrary, Lawyer owes no duty to a third party claiming an interest in the funds. Furthermore, Lawyer has an obligation to follow the client's directive with respect to funds belonging to the client. Rule 1.15-2(m).

Inquiry #2:

Lawyer receives a $5,000 advance fee from domestic Client. At the time Lawyer receives the funds, Client says that the $5,000 was a gift from her boyfriend. After Lawyer has expended $2,000 of the fee, Boyfriend and Client break up. Boyfriend calls Lawyer and demands the unused portion of the fee back. Prior to this telephone call, Lawyer has never had any contact with Boyfriend. Client maintains that the $5,000 was a gift to her, with no strings attached, and directs the Lawyer not to return the funds.

What is Lawyer's ethical obligation with respect to the $5,000?

Opinion #2:

Lawyer again has no duty to the ex-boyfriend under these facts. Lawyer may rely upon Client's representation that the $5,000 was a gift and follow Client's directive as to how to use those funds. Lawyer may also need to advise Client about any legal obligations she may have to the ex-boyfriend if the $5,000 was a loan rather than a gift.

Inquiry #3:

Lawyer receives a $5,000 advance fee from domestic Client. Client says the $5,000 is a general loan from her mother. After Lawyer expends $2,000, Mom calls Lawyer and says she didn't know Client would use the funds for legal fees, and she doesn't support her daughter's case. Mom asks that the unused portion of the funds be returned to her. Client does not consent and demands that Lawyer retain the money and pursue her case. Prior to this telephone call, Lawyer has never had any contact with Mom.

Must lawyer return the unused portion of the fee to Mom?

Opinion #3:

No. Again, Mom is a third party claiming an interest in the $5,000. Client agrees that the funds were a loan from Mom, but it is unclear whether there were any restrictions placed upon the loan. This is a dispute between Client and Mom, inasmuch as Lawyer was never involved in the original loan from Mom to Client. Lawyer should follow Client's directive as to the use of these funds and advise Client of any legal obligations she may have to Mom.

Inquiry #4:

Adult Client and her mother come to Lawyer's office together. Mother agrees to pay a $5,000 advance fee for representation of Client in her domestic case. Pursuant to Rule 1.8, Lawyer makes sure Mother understands that Lawyer represents only Client's interests, not Mother's, and that information received from Client during the course of the representation remains confidential. Client consents to the payment of her fees by Mother, and Mother agrees to pay under these terms. Lawyer deposits the $5,000 in his trust account and begins billing against it.

Shortly thereafter, Mother and Client having a falling out, and Mother demands the unused portion of the $5,000 back. Client wants Lawyer to keep the funds and continue with the representation.

Must Lawyer return the unearned portion of the fees to Mother?

Opinion #4:

Yes. Under these facts, Lawyer understands that the legal fees were paid by a third party for the purpose of Client's representation. *See* Rule 1.8(f). The unearned funds held in trust belong to the third party, not the client. In the event the payor wants the funds returned, Lawyer is obliged to do so. Lawyer should explain to both Client and the third-party payor, at the outset, that the funds belong to the third party, that the funds will remain in trust until earned, and that if the third-party payor demands return of the unearned funds, Lawyer must return the funds to the payor. In addition, Lawyer may continue representation and seek payment from Client. If Client is unable to pay, Lawyer must decide whether withdrawal from representation is appropriate under Rule 1.16(b)(6).

Inquiry #5:

Assume the same facts as in Inquiry #4, except that Lawyer received a $5,000 flat fee from Mother to represent Client in her domestic matter. Lawyer explained to Client and Mother that the fee is earned immediately and will be placed in Lawyer's operating account. Lawyer also explained that the flat fee would not vary based upon the amount of time expended and assured them that this was the only legal fee owed to him. After Lawyer has begun work on the case, Mother demands the fee back. Client does not consent.

What should Lawyer do?

Opinion #5:

If the flat fee is earned immediately and it is not "clearly excessive" under the circumstances, then the fee will ordinarily belong to the lawyer. *See* Rule 1.5(a). Lawyer need not return any portion of the fee to Mother. If, upon conclusion of the representation, however, Mother disputes the amount of fee charged, Lawyer must notify Mother of the State Bar's program of fee dispute resolution. Lawyer should place the disputed portion of the funds back in his trust account and must participate in good faith in the fee dispute process if Mother submits a proper request to the State Bar. *See* Rule 1.5(f).

Proposed 2005 Formal Ethics Opinion 13
Unearned Portion of a Minimum Fee Must Be Returned to the Client
October 20, 2005

Proposed opinion rules that a minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

Inquiry #1:

Law Firm is made up of five partners and one associate. Partnership expenses, debts, and profits are divided equally among all partners irrespective of gross receipts and are paid weekly.

Partner C, who practiced family law litigation, typically used a fee contract referred to by the firm as a "minimum fee" contract. The contract provides that the initial fee charged to the clients is the greater of (1) the flat fee established in the contract, or (2) an hourly rate applied to actual time that will be spent in representation of the client. A minimum fee paid by the client was deposited into the firm's general account. The contract, however, did not state that the fee was deemed earned and payable to the attorney upon receipt.

Partner C left Law Firm and opened his own practice. Most his clients chose to follow C for continued representation. These clients paid the minimum fee, according to the terms of the fee contract, to Law Firm prior to C's departure. Shortly after C's departure, C sent a letter to Law Firm requesting a transfer of his clients' remaining funds to C. The remaining funds are the difference between the fees collected at the beginning of each representation and the value of the hourly services performed by C for each client prior to leaving Law Firm.

Law Firm refused to comply with C's request reasoning that the fees were deposited into the firm's operating account and used to pay ongoing expenses, including partnership draws, of which C received his share. At C's direction, the clients then began to contact Law Firm demanding a refund of their remaining funds so that the money could be paid to C for continued representation. If the remaining funds are not returned, C's clients may be precluded from having C continue to represent them.

Are the lawyers remaining with Law Firm required to refund any funds to C's clients?

Opinion #1:

Yes. Law Firm incorrectly deposited the "minimum fees" into the firm's operating account. In order for a payment made to an attorney to be earned immediately, the attorney must clearly inform the client that it is earned immediately, and the client must agree to this arrangement. *See* RPC 158. Even with the consent of the client, only true retainers and flat fees are deemed earned by the lawyer immediately and therefore can be deposited into the operating account upon receipt. A minimum fee that will be billed against at the lawyer's hourly rate is client money and belongs in the trust account until earned. *See* Rule 1.15-2 (b). In the present case, at some point during the representation, Law Firm would calculate the number of hours C spent on the case and determine whether the client owed more money. The fee arrangement was therefore neither a true retainer nor a flat fee. Furthermore, Law Firm's fee contract did not make an allowance for the fee to be deposited into the firm's operating account. Therefore, those portions of the minimum fees that were not earned by C's labor while with Law Firm remain client funds and must be returned to the clients. *See* Rule 1.16(d). If Law Firm does not return the unearned portions of the funds to C's clients, they will have collected an excessive fee in violation of Rule 1.5(a).

Inquiry #2:

Will the answer be different if by subsequent agreement the client consents to the deposit of the minimum fee into Law Firm's operating account?

Opinion #2:

No. A client has the right to terminate the representation at any time with or without cause. *See* 97 Formal Ethics Opinion 4. When the client-lawyer relationship ends, if the fee is clearly excessive in light of the services actually rendered, the portion of the fee that makes the total payment clearly excessive must be returned to the client. *See* 2000 Formal Ethics Opinion 5. *See also* opinion #1.

Inquiry #3:

What duties are owed by Law Firm and/or C to former clients of Law Firm for whom legal work is ongoing, with respect to (a) an accounting for fees previously paid to Law Firm pursuant to the fee contract, (b) a request for refund of fees, and (c) providing future legal services in accordance with the fee contract?

Opinion #3:

(a) Law Firm and C are responsible for providing an accounting of the fees to the client, upon request or at the end of the representation. *See* Rule 1.15-3 (d).

(b) All of the lawyers in Law Firm, whether in its current incarnation or at the time the fees were collected, are responsible for refunding any unearned portions of the fees. *See* opinion #1.

(c) Once a fee agreement is reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interest, subject to the right or duty to withdraw under Rule 1.16. *See* Rule 1.5, comment 5.

Inquiry #4:

Is it ethical for C to instruct former clients of Law Firm, who are represented by C, to seek a refund of fees so that they can pay for their continued representation by C?

Opinion #4:

Yes. *See* opinion #1.

Proposed 2005 Formal Ethics Opinion 14
Identifying Information in URL for Law Firm Website
October 20, 2005

Proposed opinion rules that the URL for a law firm website does not have to include words that identify the site as belonging to a law firm provided the URL is not otherwise misleading.

Inquiry:

2005 FEO 8 ruled that the URL for a law firm website is a trade name that must be registered with the State Bar, in compliance with Rule 7.5(a), and may not be misleading.

Lawyers have applied to the State Bar to register the following URLs for their law firm websites: "Asbestos-Mesothelioma.com" "DrugInjury.com" and "NCworkinjury.com". None of the URLs contain language sufficient to indicate to a user that the URL is for the website of a law firm. May a law firm use a URL that does not include words or language sufficient to identify it as the address of a website of a law firm?

Opinion:

Yes, provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm.

Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm. ■

Proposed Rule Amendments (cont.)

of insurance coverage, **and/or a *pro hac vice* registration statement**, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Administrative Committee. If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent, and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee, Client Security Fund assessment, and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, and/or the apparent failure to file a certificate of insurance coverage **and/or *pro hac vice* registration statement**.

. . . .

(e) Late Tender of Membership Fees, Assessed Costs, or Certificate of Insurance Coverage.

If a member tenders to the North Carolina State Bar the annual membership fee, the $30 late fee, Client Security Fund assessment, any district bar annual membership fee, and/or any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar **and/**or overdue certificate of insurance coverage **and/or the *pro hac vice* registration statement** before a suspension order is entered by the council, no order of suspension will be entered.

.0904 Reinstatement After Suspension for Failure to Pay Fees or Assessed Costs, or to File Certificate of Insurance Coverage or *Pro Hac Vice* Registration Statement

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who has been suspended for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of subchapter A, **and/or a *pro hac vice* registration statement as required by Rule .0101 of Subchapter H**, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of certification of insurance coverage, **registration of *pro hac vice* admission**, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order. At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or failure to file a certificate of insurance coverage, **and/or file a *pro hac vice* registration statement**, may petition the council for an order of reinstatement.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) . . . .

(5) that the member has filed a certificate of insurance coverage for the current year; **and**

(6) that the member has filed any overdue *pro hac vice* registration statement for which the member was responsible.

(d) . . . . ■

State Bar Swears in New Officers


Murphy


Michael


Hankins

Murphy Installed as President

Charlotte attorney Calvin E. Murphy was installed as president of the North Carolina State Bar. He was sworn in by Chief Justice I. Beverly Lake Jr. at the State Bar's Annual Meeting on Thursday, October 20, 2005, and officially took office at the conclusion of the council meeting on October 21, 2005.

After graduating from Davidson College, Murphy spent a tour of duty as an officer in the US Army, then worked in the private sector as a public relations specialist for two years before attending North Carolina Central University School of Law. At NCCU, Murphy served as associate editor of the Law Review. He earned his JD degree (magna cum laude) in 1977 and was admitted to the practice of law that same year.

From 1977-1982, Murphy worked as an assistant district attorney in Charlotte. In 1982 he joined the firm of Casey, Bishop, Alexander and Murphy. In 1989 he formed the firm with which he currently practices, Murphy & Chapman, PA.

Murphy has been a State Bar Councilor representing the 26th Judicial District since 1995. While on the council he has served as chair of the Grievance Committee, the Client Assistance Committee., and the Disciplinary Review Committee. In addition to his service on the State Bar Council, Murphy has been active in the American Bar Association, the North Carolina Bar Association, the North Carolina Academy of Trial Lawyers, and the Mecklenburg County Bar Association. Murphy is a life-long member of Logan Chapel C.M.E. Church in Charlotte where he serves as chairman of the church's Finance Board. He has two children, Zoel Kaliq and Sommer Joy; and one grandson, Caleb.

Michael Elected President-Elect

Kitty Hawk attorney Steven D. Michael was elected as president-elect of the North Carolina State Bar. He was sworn in by Chief Justice I. Beverly Lake Jr. at the State Bar's Annual Meeting on Thursday, October 20, 2005, and officially took office at the conclusion of the council meeting on October 21, 2005.

After graduating from East Carolina University, Michael attended law school at the University of North Carolina. He earned his degree in 1975 and was admitted to the practice of law that same year.

Michael worked with the Raleigh firm of Ransdell & Ransdell from 1975-1977. From 1977-1980, Michael worked in the Wake County District Attorney's office, and then practiced in Manteo with Kellogg, White, Evans, Sharp & Michael from 1980-1985. In 1991-1992, Michael served as a Resident Superior Court Judge in the First District. He is currently a partner with the firm of Sharp, Michael, Outten & Graham.

Michael has been a State Bar Councilor representing the First Judicial District since 1996. In addition to chairing the council's Issues Committee, he has served on the Grievance Committee, the Authorized Practice Committee, and the Special Committee on Real Property Closings.

In addition to serving on the State Bar Council, Michael is active with the First District Bar Association and the American Bar Association.

Hankins Elected Vice-President

Charlotte attorney Irvin W. Hankins III was elected as vice-president of the North Carolina State Bar. He was sworn in by Chief Justice I. Beverly Lake Jr. at the State Bar's Annual Meeting on Thursday, October 20, 2005, and officially took office at the conclusion of the council meeting on October 21, 2005.

Hankins earned both his undergraduate and law degrees (with honors) from the University of North Carolina at Chapel Hill. From 1968 to 1972 he served in the US Navy. Hankins was admitted to the practice of law in 1975. That year he joined the firm now known as Parker, Poe, Adams & Bernstein, LLP. Hankins is general counsel to the firm and served as its managing partner from 1987-2002. He is admitted to practice before the federal district courts in North Carolina, the Fourth Circuit Court of Appeals, and the United State Supreme Court.

Hankins has been a State Bar Councilor representing Judicial District 26 since 1997. He has served on numerous committee and has chaired the Ethics Committee and the Authorized Practice Committee.

In addition to serving the State Bar Council, Hankins has served as general counsel to the Charlotte Chamber of Commerce, is past-president of the UNC Law Alumni, is a member of the Queens University of Charlotte Board of Trustees, and is a member of the NC Association of Defense Attorneys. He is also a member of the Selwyn Avenue Presbyterian Church where he has served as a deacon and an elder. ■

In Memoriam

William H. Petree
Winston-Salem (1920-2005)

Robert "Bob" Noble Randall
Mooresville (1932-2005)

B. F. "Bill" Wood
Burlington (1925-2005)

Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Roy W. Davis Jr., addressed the gathering and each honoree was presented a certificate by the president of the State Bar, Robert F. Siler, in recognition of his or her service. After the ceremonies were concluded the honorees in attendance sat for the photograph below. ■

First Row Forrest E. Campbell, Jack Arthur Moody, Zeb D. Alley, Robert N. Robinson, Robert C. Bryan, John V. Blackwell Jr., F. Kent Burns, June Darius Hurst, and James L. Seay *Second Row* Robert C. Vaughn Jr., Roy W. Davis Jr., Allie B. Latimer, Steve B. Dolley Jr., Eugene C. Hicks III, Nelson W. Taylor III, Alex Warlick Jr. *Third Row* Stephen F. Franks, Roy G. Hall Jr., Louis A. Bledsoe Jr., J. Bruce Morton, John V. Hunter III, Richard O. Gamble, Calvin B. Bryant, Alfred C. Brinson, George K. Freeman Jr.

Disciplinary Actions (cont.)

counsel advised of her current address during a period in which she was representing North Carolina death row inmate Elrico Darnell Fowler. Teachout currently lives in Cambridge, Mass.

Transfers to Disability Inactive Status

Six attorneys were recently transferred to disability inactive status pursuant to orders of the DHC or Grievance Committee. They are **Brian K. Manning** of Fayetteville, **R. Patrick Durkin** of Belmar, New Jersey, **James J. Johnston** of Durham, **John Freeman** of Asheville, **David Harless** of Charleston, West Virginia, and **E. Daniels Nelson** of Beaufort. The order in Nelson's case, which was entered by consent, also found that Nelson engaged in several violations of the Rules of Professional Conduct. There were no findings of misconduct in the other five disability orders. ■

Britt Receives Professionalism Award

The Honorable David M. Britt has been selected as the 2005 recipient of the Chief Justice's Professionalism Award. This award is presented annually by the chief justice of the North Carolina Supreme Court at the fall meeting of the North Carolina State Bar.

Justice Britt was born and raised in Robeson County. He attended Wake Forest College from 1933 to 1935 and Wake Forest Law School from 1935 to 1937. He did not graduate but passed the Bar exam in 1937, at age 20. After being admitted to the Bar in 1938, he started his own law practice in Fairmont, which is also where he began a very vibrant political career. His first position as an elected official was solicitor of the Fairmont District Recorder's Court in 1940. As his practice grew, so did his excellent reputation for honesty, straightforwardness, devotion, and hard work. He was very active in the Fairmont community, where he served in leadership positions within his church, the local Board of Education, Rotary International, as Robeson County Democratic Chairman, and on the State Democratic Executive Committee. Other community leadership positions held included vice president and trustee of the state Baptist Convention, and trustee of Wake Forest University, Southeastern Baptist Seminary, and Meredith College. He continues to serve on the Board of Visitors at Wake Forest University.

In 1958, Justice Britt was elected to the North Carolina House of Representatives, where he was a leader in the movement toward court system improvements and a principal architect of legal and judicial reform. In addition to serving as Speaker, he served on several committees and commissions within the General Assembly, most notably the Courts Commission, which would implement many court improvements.

In 1967, Governor Moore appointed him as one of the six original judges of the newly created North Carolina Court of Appeals. In 1978, after winning a primary election for the seat to be vacated by retiring Justice I. Beverly Lake on the North Carolina Supreme Court, Governor Hunt appointed him to succeed Justice Lake after he chose early retirement. Justice Britt served four years on the Supreme Court and retired on August 31, 1982. Since then, he has served as an emergency judge, worked with the Raleigh firm of Bailey and Dixon as counsel, and has enjoyed family and friends in Cary. ■

Bar Presents Awards to Students for Pro Bono Service

The faculty of Wake Forest University School of Law selected **Jessica Lowry Bell** to be recognized for her pro bono service. In 2002, as a new law student, Jessica arrived at a Habitat for Humanity work site, even though she just had foot surgery. That day was the beginning of her service to others. Jessica volunteered at the local women's shelter, lead the law school's first attempt to raise funds for this shelter, and participated with Wake Forest's Domestic Violence Advocacy Clinic. Jessica also helped develop Forsyth County's Truancy Court Project, as well as its Hispanic Deferred Prosecution and Education program.

Jessica Elaine Cooley was selected by Campbell University's Norman Adrian Wiggins School of Law for recognition. She is nominated for her extensive work on the Innocence Project during her third year.

North Carolina Central University Law School selected **Amanda J. Reeder**. Amanda was an active volunteer with the NCCU Law Innocence Project. She became one of the project's leaders, serving as a board member in her second year and as vice-chair her third year. During the summer following her second year, Amanda volunteered full-time with the Durham office of Legal Aid of North Carolina, Inc., where she handled cases in the areas of landlord-tenant, consumer protection, and public benefits law. She continued working for Legal Aid on a volunteer basis 15-20 hours per week during her third year of law school, ultimately accumulating a total of 456 pro bono hours.

Duke University Law School selected **Leslie Cooley** as outstanding pro bono student for 2005. Leslie was the student director of the Street Law program in which she located placements and recruited law students to teach criminal and consumer law to Durham middle- and high-school students. She spent hundreds of hours working on a case for a client on death row through Duke's Death Penalty Clinic. She also participated in Duke's Poverty Law Clinic and UNC's Community Clinic. She did an independent study, working with attorney Jim Maxwell to design mental retardation hearings for review of death penalty cases. As a member of the Public Interest Law Foundation (PILF), she was auction chair and raised over $57,400 in funds for students to do summer public interest work, and was head of alumni relations to get alumni involved in public interest and PILF contributions.

At the University of North Carolina School of Law, **Carmen Hoyme** stood out as a pro bono leader, logging the most pro bono hours in the 3L class (a whopping 278) and consistently participating in pro bono projects over her three years at Carolina Law. Carmen worked on disability law issues for Carolina Legal Assistance during her first summer and with Advocates for Children's Services during her second summer. Carmen has devoted the vast majority of her pro bono service to the NC Guardian Ad Litem (GAL) program. ■

Resolution of Appreciation of Robert F. Siler

WHEREAS, Robert F. Siler was elected by his fellow lawyers from the 30th Judicial District in January 1994 to serve as their representative in this body. Thereafter he was elected for two additional three-year terms as councilor; and

WHEREAS, in October 2002, he was elected vice-president and in October 2003, he was elected president-elect. On October 22, 2004, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Mr. Siler has served on the following committees: Grievance; Legal Aid to Indigents; Publications; Grievance Procedures Review; Budget, Finance, and Audit; Civil Access to Justice; Criminal Access to Justice; Executive; Professionalism; Client Assistance; Authorized Practice; Emerging Issues; and Legislative; and

WHEREAS, Mr. Siler became the president of the State Bar during a time of crisis, with many inside and outside the legal community questioning whether the State Bar could be trusted to regulate the profession competently and fairly. Characteristically, he met the problem head on, accommodating the council's desire for an independent assessment of the situation by appointing individuals of surpassing character, discernment, and reputation to a Disciplinary Review Committee. Having constituted the committee and provided for its leadership, he deftly managed the overall situation so as not to deflect the State Bar from its important ongoing work. Now, 12 months later, as he leaves office, President Siler can note with satisfaction that thanks in large measure to his good stewardship, the credibility of the State Bar has been restored, remarkably with no interruption in service to the public; and

WHEREAS, it is a testament to the inspired leadership and commitment of Mr. Siler that, in addition to superintending the routine aspects of the agency's work during a period of turmoil, he facilitated consideration of a great many extraordinary initiatives and issues. From his office at the State Bar's headquarters in Raleigh and from his office at the "Western White House" in faraway Franklin, and from the front seat of his automobile as he drove thousands upon thousands of miles back and forth between the two, Bud Siler shepherded successfully legislation of great importance to the State Bar, oversaw the implementation of the new paralegal certification program and the development of an important new area of legal specialization, and orchestrated searching introspective evaluations of the State Bar's disciplinary program, its Lawyer Assistance Program, and its relationship to the American Bar Association; and

WHEREAS, like many of his predecessors, Mr. Siler campaigned vigorously during his year as president to discourage theft and other abuses of client trust. Recognizing that the depredations of a very few lawyers have greatly tarnished the reputation of us all, Mr. Siler pressed his Issues Committee to explore a wide range of novel regulatory responses to the problem of embezzlement. He also wrote and spoke extensively and convincingly on the subject, lending the prestige of his office and his own considerable moral authority to the cause of professional fidelity; and

WHEREAS, Bud Siler gave voice to a constituency of the Bar that has not always been heard in the State Bar Council. From his home in a small town in the mountains, Mr. Siler brought a unique perspective to the profession's highest office, ensuring that the decisions of the council were informed by a sophisticated rural sensibility. Even though it is clear that Bud Siler would have been a great leader of the Bar had he chosen to practice in the metropolis or at the beach, it cannot be doubted that his life as a lawyer amid the hills where he was born prepared him to lead the Bar superbly and uniquely.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of Robert F. Siler, and expresses to him its gratitude for his personal service and dedication to the principles of integrity, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the Annual Meeting of the North Carolina State Bar and that a copy be delivered to Robert F. Siler.

Client Security Fund Reimburses Victims

At its October 20, 2005, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $59,865.80 to 15 clients who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. An award of $27,724.80 to a former client of Zachary T. Bynum III of Winston-Salem, North Carolina. The board found that the client was delinquent in his mortgage payments and made a withdrawal from his bank account to pay toward the mortgage. The client gave the funds to Bynum. Bynum misappropriated a portion of the funds. Bynum was disbarred on April 23, 2004.

2. An award of $3,600.00 to a former client of Gene Dickey of Winston-Salem, North Carolina. The board found that the client retained Dickey to handle a personal injury matter. Dickey settled the client's claim and retained funds to pay the client's medical providers. Dickey failed to pay the medical providers. Dickey was disbarred on September 24, 2004.

3. An award of $3,800.00 to a former client of Walter T. Johnson Jr. of Greensboro, North Carolina. The board found that Johnson was retained by an inmate's father to seek parole for the inmate. The inmate had over 40 infractions and was not eligible for parole. Johnson failed to perform any substantive work on the clients' behalf. Johnson was disbarred on April 6, 2005.

4. An award of $14,500.00 to a former client of Walter T. Johnson Jr. of Greensboro, North Carolina. The board found that Johnson accepted $14,500.00 to represent a client on serious criminal charges during the wind down period following Johnson's 2003 suspension. Johnson provided no beneficial services for the client after he was retained.

5. An award of $2,000.00 to a former client of Jonathan Koffa of Zebulon, North Carolina. The board found that Koffa was retained to handle a real estate closing. Koffa withheld $2,000.00 from the closing proceeds to cover pending claims for repairs to a septic system. There were no claims by the buyers, and Koffa did not disburse the funds to either party. Koffa was disbarred on April 23, 2004.

6. An award of $600.00 to a former client of William R. J. La Ronde of Wilmington, North Carolina. The board found that La Ronde was retained to handle a domestic matter and failed to do any substantive work on the client's behalf. La Ronde was transferred to inactive status on September 11, 2003.

7. Awards totaling $2,196.00 to three former clients of Darwin Littlejohn of Winston-Salem, North Carolina. The board found that Littlejohn was retained to handle their domestic matters and failed to do any substantive work on the clients' behalf. Littlejohn was disbarred on June 10, 2005.

8. An award of $1,500.00 to a former client of Darwin Littlejohn. The board found that Littlejohn was retained to assist the client in an attempt to get his driver's license reinstated by DMV and failed to perform any substantive work on the client's behalf.

9. An award of $1,000.00 to a former client of Richard Poling of Charlotte, North Carolina. The board found that Poling was retained to represent the client in a medical malpractice claim. At the initial conference the client paid Poling $1,000.00 to hire an expert to review the medical records. Poling failed to do any work on the client's behalf, and failed to hire an expert to review the medical records. Poling was disbarred on February 18, 2005.

10. An award of $1,500.00 to a former client of Armina Switzenberg of Salisbury, North Carolina. The board found that Switzenberg was retained to handle two foreclosure matters for the client when she knew she would not be able to complete the representation. Switzenberg was disbarred on November 30, 2004.

11. Awards totaling $945.00 to two former clients of Armina Switzenberg. The board found that Switzenberg was retained to handle domestic matters in both cases and failed to provide any valuable legal services.

12. An award of $500.00 to a former client of N. Jerome Willingham formerly of Jacksonville, North Carolina. The board found that Willingham was retained to represent a client in a military court martial hearing. Willingham accepted the client's case just prior to the effective date of his disbarment. Willingham was disbarred on October 1, 2004. ■

2006 Appointments to Boards and Commissions

JANUARY COUNCIL MEETING

Lawyer Assistance Program Board (3-year terms) There are three appointments to be made. Edward T. Hinson Jr., Mary H. Howerton, and W. Terry Sherrill are not eligible for reappointment.

APRIL COUNCIL MEETING

Disciplinary Hearing Commission (3-year terms) There are five appointments to be made. W. Steven Allen Sr. and Carlyn G. Poole are not eligible for reappointment. Charles M. Davis, John M. May, and T. Richard Kane are eligible for reappointment.

Legal Aid of North Carolina (3-year terms) There is one appointment to be made. John H. Vernon III is eligible for reappointment.

JULY COUNCIL MEETING

Board of Legal Specialization (3-year terms) There are three appointments to be made. Franklin E. Martin and Karen D. Golden are not eligible for reappointment. Dallas C. Clark Jr. is eligible for reappointment.

IOLTA Board of Trustees (3-year terms) There are three appointments to be made. Robert F. Baker, Marion A. Cowell, and Michael C. Miller are all eligible for reappointment.

OCTOBER COUNCIL MEETING

Board of Continuing Legal Education (3-year terms) There are three appointments to be made. Daniel B. Dean and Margaret M. Hunt are not eligible for reappointment. Judge Robert B. Radar is eligible for reappointment.

Board of Law Examiners (3-year terms) There are three appointments to be made. Karl Adkins is not eligible for reappointment. William K. Davis and Samuel S. Woodley Jr. are eligible for reappointment.

Board of Paralegal Certification (3-year terms) There are three appointments to be made. Renny W. Deese (attorney) and John M. Harris (attorney) are eligible for reappointment. Tammy Moldovan (paralegal) is eligible for reappointment provided she is one of two nominees for the position determined by a vote of active certified paralegals.

Client Security Fund Board (5-year terms) There is one appointment to be made. William O. King is not eligible for reappointment.

NC LEAF (1-year term) One appointment needs to be made. Victor J. Boone is eligible for reappointment. ■

IOLTA (cont.)

Huffman Law Firm, PA, Salisbury
James, Randolph M., PC, Winston-Salem
Jones, Cathy Fuller, Harkers Island
Jones, Key, Melvin & Patton, PA, Franklin
Kim, Hee Jin, High Point
Krohn, Clayton B., Greensboro
Kromer, Sarah J., PLLC, Charlotte
Larcade & Heiskell, PLLC, Raleigh
Lederer Law Firm, Greenville
Manning, Larry A., Nashville
Matheson, Douglas P., Greensboro
Maynard Law Firm, Elizabethtown
Odom Law Firm, PLLC, Charlotte
Oxner, Thomas & Permar, Greensboro
Paxton, Brian, Wilson
Penny, Mark Lynn, Lillington
Poe, Kimberly L., Iron Station
Quander & Rubain, PA, Winston-Salem
Radford, Jeffrey E., Fayetteville
Rice Law, PLLC, Wilmington
Rigsbee & Cotter, Durham
Rusher, James T., PA, Boone
Sharpe, Jenny L., Charlotte
Siket, Solis & Maher, PLLC, Asheville
Sneeringer, Mary L., PLLC, Skyland
Strickland, David H., Charlotte
Tash & Kurtz, PLLC, Winston-Salem
Walker, Jeffrey J., Boone
Walker, Marion Patrice, Chapel Hill
Walker, R. Shane, Greensboro
Ward, David John, Raleigh
Winters, Sabrina, PLLC, Charlotte
Wood, Karla M., Waynesville ■

IOLTA Bank News

BB&T & SunTrust now provide their monthly remittance reports to NC IOLTA electronically. While this does not directly increase IOLTA's income, it does help us keep expenses low by saving our staff time. Bank of America and Wachovia have been reporting electronically for some time, and we are working with First Citizens to implement electronic reporting.

New Banks—we are pleased to report the following banks have started participating in the NC IOLTA program since the last publication of the Participating Financial Institutions list:
Anson Bank; Carolina Commerce Bank; Harrington Bank; Mountain 1st Bank; NewDominion Bank; Securities Savings Bank; and Sound Bank.

Adding new banks across the state offers more opportunities for attorneys and firms to participate in the IOLTA program.

State Bar Boards and Agencies Report Progress

Board of Paralegal Certification

The Board of Paralegal Certification was established last fall, after the amendment of Chapter 84, to permit the certification of paralegals by the State Bar, and the adoption of the Plan for Certification of Paralegals (the Plan) by the council, both in summer 2004, and the approval of the Plan by the Supreme Court in October 2004. The board has met eight times since the council appointed three lawyers, one lawyer/paralegal educator, and four paralegals to serve with me. At most of these meetings, there has been one hundred percent participation by board members.

At the first meeting of the board on December 10, 2004, the board decided that it would set July 1, 2005, as the target date for accepting the first application for certification from a paralegal. At the second board meeting on January 19, 2005, the board adopted its 2005 budget in which income was projected based upon an estimate that 500 applications would be received in 2005 from interested paralegals. The board is pleased to report that it fulfilled its commitment to accept applications on July 1 and, as of October 6, 2005, the board had received over 700 applications. The board continues to receive 10-20 applications on a daily basis. Needless to say, the program is enthusiastically embraced by North Carolina paralegals.

Over the past year, the board created the program for certifying paralegals from the ground up. The tasks of the board ran the gambit from determining the appropriate fees to charge for application and continued certification to evaluating the applications of and certifying 264 paralegals. Along the way, the board has accomplished the following

- Authorized the writing of a software program for the paralegal database that has been in operation since the first application was processed;
- Appointed a Certification Committee, as required by the Plan, to review applications and to draft the certification exam that will be required in 2007;
- Created a procedure for processing and approving applications including staff review, Certification Committee review, and final board review and approval;
- Established policies for analyzing an applicant's criminal record or non-traditional work experience;
- Formed board committees to evaluate and accredit continuing paralegal educational activities, to determine whether a paralegal education program should be designated "qualified" under the Plan, and to publicize and explain the certification program;
- Drafted and published for comment rules on continuing education for paralegals—one of the most important consumer-protection aspects of the program;
- Revised the Plan for Certification of Paralegals to clarify the requirements for qualified paralegal education programs including designating all ABA approved programs and all institutional members of the American Association for Paralegal Education as qualified programs (these rules are before the council for final approval today);
- Designated eight North Carolina paralegal studies programs as qualified paralegal studies programs under the Plan, in addition to the five North Carolina programs that are currently approved by the ABA; and
- Hired a part-time assistant director, Tara Wilder, who is a former paralegal, to administer the plan on a daily basis.

Much of the groundwork is complete and the program is running smoothly although somewhat behind on the approval of applications. In 2006, the board plans to keep apace with the applications that it receives. We are confident that we will continue to attract qualified applicants and that the program will operate in the black in 2006. At the beginning of 2005, the council allocated $50,000 as "seed money" to the paralegal certification program. The board intends to repay $10,000 of that money this year and possibly more.

The purpose of certifying paralegals is set forth as follows in Rule .0101 of the Plan:

> to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.

The importance of this program to paralegals is evident in the response that the board has received. The board firmly believes that the importance of the program to the lawyers who employ paralegals, and to their clients, will be borne out over time.

Board of Continuing Legal Education

The Board of Continuing Legal Education's success at monitoring and enforcing compliance with the CLE rules continues to improve. Ninety-nine percent of the active members of the North Carolina State Bar are in compliance with the mandatory CLE requirements. In 2005, the CLE department collected and filed almost 20,000 annual report forms for courses taken in 2004. On average, each member of the bar took almost 14 hours of CLE in 2004—two hours above the minimum requirement. Penalty fee collection (for late filing of the annual report form and late completion of the mandatory credit hours) stands at 147% of the amount projected for this line item in our 2005 budget. It is anticipated that the majority of outstanding compliance issues from 2004 will be resolved by the end of 2005.

An important change to the CLE rules is before the council at this time. The proposed amendment to Rule .1604 (d),

Accreditation of Prerecorded, Simultaneous Broadcast, and Computer-Based Programs, reduces the number of registrants required for a video replay from five to three. This proposed change will give sponsors greater flexibility in presenting CLE programs and permit more programs to be presented in rural areas. This proposal is a part of the CLE Board's continuing effort to improve the convenience and availability of quality CLE programming for North Carolina lawyers.

With the completion of enhancements to the computer programming and accounting systems, the CLE department is now able to issue quarterly statements to sponsors of CLE programs. A sponsor's quarterly statement clearly explains any outstanding balance or overpayment of attendance fees. At the end of each compliance year, a final yearly statement will be issued to each sponsor, thereby allowing the financial record for each compliance year to be finalized in a more timely manner.

The CLE website, www.nccle.org, continues to grow in popularity among members of the bar. More and more members are relying upon the site to view their "real time" CLE transcripts and to locate appropriate CLE courses on the on-line course database. Future projects for the site include improving content and navigation to make the site more relevant and helpful to bar members.

Finally, there has been turnover in both the staff of the CLE department and the board. Heather Pattle replaced Kathryn Allen as the assistant director in May of this year. Kathryn laid a firm foundation from which the board continues to build a more organized, technologically advanced, and efficient department.

Kaye Webb, who has served as vice chair of the board for the past two years, is leaving the board after fulfilling two full terms. Her measured, practical approach to the issues that come before the CLE board will be greatly missed.

The board will continue to strive to improve the program of mandatory continuing legal education for North Carolina lawyers. The board welcomes any recommendations or suggestions that councilors may have in this regard. The members of the board are grateful for the opportunity to contribute to the protection of the public by advancing the competency of North Carolina lawyers.

Board of Legal Specialization

This has been another successful year for the State Bar's specialization program. This spring, the board received 58 applications from lawyers seeking to be certified. Of that number, 54 applicants will sit for the specialization examinations in two weeks. This is the third year in a row in which more than 50 lawyers will sit for the certification exams. The three specialty areas for which the board received the most applications are (in declining order) Criminal Law, Workers' Compensation Law, and Family Law.

Last year, applicants were allowed to take the specialty examinations on their laptop computers. The use of laptops lessened the strain of the exam process on lawyers who, typically, have not hand-written an essay exam in years. This change, in addition to offering alternative examination sites in Asheville, Charlotte, and Wilmington, helped to make the examination process less onerous.

Once certified, specialists rarely allow their certification to lapse. In January, 83 lawyers were recertified as specialists in their chosen areas of certification, and this fall we received 103 applications for recertification in all seven of the specialty areas. Many of these were workers' compensation law specialists who are recertifying for the first time, and 14 were specialists who have been board certified for over 15 years.

The board continues to study the demographics of our applicant pool. The profile of a typical 2005 applicant is a lawyer with 11-15 years of experience who practices in an urban area in a firm with nine lawyers or less. This profile indicates that certification is valuable to mid-career lawyers in small urban firms who may see certification as a professional way to distinguish their practices.

The board's mission, as set forth in the State Bar rules, is to assist in the delivery of legal services to the public by identifying and pursuing appropriate new areas of specialty certification. The board has not proposed a new specialty certification since 2003. Earlier this year, a group of lawyers who represent claimants for Social Security disability benefits approached the board about creating a specialty in Social Security disability law. The board's recently adopted guidelines for creating a new specialty required this group of lawyers to submit an application to create the specialty. This application required the supporting signatures of over 100 lawyers thereby demonstrating that there is substantial interest among the members of the bar in the creation of the new specialty. In addition, the applicants had to demonstrate that the practice area is both distinct and established by showing that there is a Bar Association or Academy section or committee devoted to the practice area, that the specialty is offered by other state or national certifying organizations, or is listed as a practice area by Martindale Hubble or *Best Lawyers in America*. The completed application included the following explanation of why recognition of a specialty in Social Security disability law will benefit members of the public:

> Approximately 52 million people, about 1 in 5 Americans, receive Social Security benefits of some type. . . . Representing claimants before the Social Security Administration and the federal courts involves specialized knowledge of the Social Security Act, regulations, rulings, and various Social Security manuals, as well as familiarity with a multilevel administrative appeals system with its own rules of procedure. . . . An attorney cannot represent Social Security claimants in the same manner as he or she would represent a client in the state courts. . . [because] the administrative process at Social Security is non-adversarial, making the process almost unique in American jurisprudence. The public needs to be able to identify attorneys who have the knowledge and experience to deal with the Social Security Administration ably and confidently.
>
> Non-attorneys may represent claimants before the Social Security Administration, yet are subject to little, if any, meaningful discipline. Non-attorneys may call themselves experts or specialists or use any other sort of designation they wish. A Social Security specialty recognized by the NC State Bar would aid the public in obtaining experienced and knowledgeable legal representation before the Social Security Administration. Such a designation will help members of the public in judging the relative merits of individual attorney and non-attorney representatives.

The standards for this new specialty were before the council on October 21, 2005, for approval to send to the Supreme Court. A

few letters of comment were received and, while offering suggestions for the exam and for how members of the public might be protected from unqualified claimants representatives, none of the letters objected to the creation of the specialty and many of the letters express support. The board requested and received the council's approval of the standards. The board believes that the Social Security specialty will help members of the public find a qualified and suitable representative on a Social Security disability claim.

The board continues to educate the public and lawyers on the value of legal specialization. This spring, the board published a comprehensive directory of legal specialists that was distributed to public libraries and clerks of court. In an effort to reach out to the growing Hispanic population, the directories were also sent to Hispanic centers and, for the first time, indicated whether a specialist is bilingual. In addition, the State Bar *Journal* featured interviews with board certified specialists such as Charlie D. Brown, Burlington estate planning and probate law specialist, Eben Rawls, a criminal lawyer from Charlotte, and The Wake Family Law Group, a firm of certified specialists in Raleigh.

The board's objectives for 2006 are to continue to improve the procedures for identifying qualified candidates for specialty certification and to educate the public and lawyers about the value of specialty certification. If any member of the State Bar would like to know more about the board's activities or procedures, or about the process for certifying specialists, please contact the specialization program at the bar. The board is proud to participate, with the council, in the continuing pursuit of improved competency of lawyers and the protection of the public.

Client Security Fund

The fund reimburses clients of North Carolina attorneys where there was wrongful taking of the clients' money or property in the nature of embezzlement or conversion, which money or property was entrusted to the attorney by the client by reason of an attorney/client relationship or a fiduciary relationship customary in the practice of law. Applicants are required to show that they have exhausted all viable means to collect those losses from sources other than the Fund as a condition to reimbursement by the fund.

Specific provisions in the Rules declare the following types of losses to be nonreimbursable:

1. Losses of spouses, parents, grandparents, children, siblings, partners, associates, or employees of the attorney.

2. Losses covered by a bond, security agreement, or insurance contract, to the extent covered.

3. Losses by any business entity with which the attorney or any person described in paragraph one above is an officer, director, shareholder, partner, joint venturer, promoter, or employee.

4. Losses which have been otherwise reimbursed by or on behalf of the attorney.

5. Losses in investment transactions in which there was neither a contemporaneous attorney/client relationship nor a contemporaneous fiduciary relationship.

All reimbursements are a matter of grace in the sole discretion of the board and not a matter of right. Reimbursement may not exceed $100,000 to any one applicant based on the dishonest conduct of an attorney.

The Board of Trustees

The board is composed of five trustees, appointed by the council of the State Bar for a term of five years. A trustee may serve only one full five-year term. Four of the trustees must be attorneys admitted to practice law in North Carolina and one must be a person who is not a licensed attorney. Current members of the board are:

Donald C. Prentiss, a partner with the firm Hornthal, Riley, Ellis & Maland, LLP in Elizabeth City, North Carolina.

William O. King, a partner with the firm Moore & Van Allen PLLC in Durham, North Carolina.

Henry L. White, the public member of the board, is a CPA and partner with the accounting firm of Stancil and Company in Raleigh, North Carolina.

Fred H. Moody Jr., a partner with the firm McKeever, Edwards, Davis and Hayes, PA, in Bryson City, North Carolina.

Janice McKenzie Cole, Cole Immigration Law Center in Hertford, North Carolina.

Subrogation Recoveries

It is standard procedure to send a demand letter to each attorney or former attorney whose misconduct results in any payment, making demand that the attorney either reimburse the fund in full or confess judgment and agree to a reasonable payment schedule. If the attorney fails or refuses to do either, suit is filed unless the investigative file clearly establishes that it would be useless to do so.

In cases in which the defrauded client has already obtained a judgment against the attorney, the fund requires that the judgment be assigned to it prior to any reimbursement. In North Carolina criminal cases involving embezzlement of client funds by attorneys, our counsel, working with the district attorney, is frequently able to have restitution ordered as part of the criminal judgment.

Another method of recovering amounts the fund pays to clients of a dishonest attorney is by being subrogated to the rights of clients whose funds have been "frozen" in the attorney's trust account during the State Bar's disciplinary investigation. When the court disburses the funds from the trust account, the fund gets a pro-rata share.

During the year covered by this report, the fund recovered $28,966.60 as a result of these efforts. Hopefully, our efforts to recover under our subrogation rights will continue to show positive results.

Claims Decided

During the period October 1, 2004 - September 30, 2005, the board decided 140 claims, compared to 87 claims decided the previous reporting year. Those 140 claims were based upon allegations of dishonest conduct by a total of 62 attorneys or former attorneys. As filed, they totaled $6,376,878.33. For various reasons under its rules, the board denied 89 of the 140 claims in their entirety. Of the 51 remaining claims, involving 18 attorneys or former attorneys, some were paid in part and some in full. Reimbursements of those 51 claims totaled $913,613.99, an average of $17,914.00 per claim. The largest amount paid on a single claim was $100,000.00, and the smallest amount paid was $100.00. The most common basis for denying a claim in its entirety is that the claim is a "fee dispute" or "performance dispute." That is, there is no allegation or evidence that the attorney embezzled or misappropriated any money or property of the client. Rather, the client feels that the attorney did not earn all or some part of the fee paid or mishandled or neglected the client's legal matter. However meritorious the client's contentions may be, the fund is not permitted to reimburse the clients in those

cases because of the requirement in the rules that a wrongful taking of money or property in the nature of embezzlement or conversion must be shown.

Funding

The 1984 order of the Supreme Court that created the fund contained provisions for an assessment of $50.00 to provide initial funding for the program. In subsequent years, upon being advised of the financial condition of the fund, the Court in certain years waived the assessment and in other years set the assessment in varying amounts to provide for the anticipated needs of the Fund.

In 1999, the Supreme Court approved a $20 assessment per active lawyer that was to continue from year to year until circumstances required a modification. Last year, due to significant embezzlements by a small number of attorneys, a modification was required and a $50 assessment was ordered.

Although the $50 assessment ordered last year was expected to pay all anticipated claims and leave a fund balance significantly above the minimum required, that was not the case. The fund paid more than $200,000 more in claims than anticipated, leaving the fund balance at the end of this year less than last year's ending balance. Although it is hoped that claims for the coming year will not be as significant as in the past year, it is imperative that the fund balance also be replenished for the fund's continuing operation. Thus, to attempt to finish the fiscal year with a fund balance that will allow the fund to achieve its purpose of reimbursing the unfortunate victims of the few dishonest attorneys in North Carolina, the board has proposed an assessment for the 2006 fiscal year of $50.00.

Financial Statements

A copy of the audited financial statement of the fund as of December 31, 2004, has previously been furnished to each member of the council. The financial statement prepared by the State Bar staff as of September 30, 2005, is attached to this report as Exhibit A.

Conclusion

The Board of Trustees wishes to convey to the council our sincere appreciation to the staff personnel who have assisted us so effectively and generously during the past year. Without the continuous support of these people, our tasks would be much more difficult. We also express our appreciation to the Bar of North Carolina for their continued support of the Client Security Fund and their efforts in reducing the incidents of defalcation on the part of a few members of our profession.

Lawyer Assistance Program

The Lawyer Assistance Program (LAP) provides assessment, referral, intervention, education, advocacy, and peer support services for all North Carolina lawyers and judges.

The LAP is designed to help lawyers find a way to address a wide range of health and personal issues, including, most commonly, alcohol/drug abuse, stress/burnout, depression, anxiety, and compulsivity disorders of all kinds, including those involving food, sex, gambling, and the internet.

All calls are strictly confidential.

Educational Outreach

LAP Presentations:

- Campbell University, 1st Year Law Students, Buies Creek, North Carolina - January 11, 2005
- Wake Forest School of Law, Raleigh, North Carolina - January 13-14, 2005
- University of North Carolina Law School, Chapel Hill, North Carolina - January 20, 2005
- Lawyer Mutual, Fayetteville, North Carolina - January 21, 2005
- Mecklenburg Bar, CLE - Charlotte, North Carolina - January 28, 2005
- National CLE Program, Durham, North Carolina - January 31-February 1, 2005
- Lawyers Mutual, Greensboro, North Carolina - February 4, 2005
- Winston-Salem Bar Association, Winston-Salem, North Carolina - February 8, 2005
- 15th Festival of Legal Learning, Chapel Hill, North Carolina - February 11, 2005, two LAP Presentations made
- Lawyers Mutual, Greensboro, North Carolina - February 24, 2005
- Lawyers Mutual, NCCU, 25th CLE, Durham, North Carolina - February 25, 2005
- Lawyers Mutual, Wilmington, North Carolina - March 11, 2005
- District Bar Meeting, Shelby, North Carolina - March 18, 2005
- University of North Carolina Law School, Chapel Hill, North Carolina - March 24, 2005
- Duke University Law School, Durham, North Carolina - April 21, 2005
- Academy of Trial Lawyers Annual Meeting, Sunset Beach, North Carolina - June 21, 2005
- North Carolina Central, Durham, North Carolina - August 18, 2005
- Judicial District 3, Greenville, North Carolina - September 23, 2005
- North Carolina Association of Women Attorney's Conference, Wrightsville Beach, North Carolina - September 30, 2005

LAP Information Flyers

- PALS: Alcoholism and Other Chemical Addictions
- FRIENDS: Depression and Mental Health
- A Guide for North Carolina Judges: Dealing with an Impaired Lawyer
- Black Lawyers Association Leadership Urges Members Use of Lawyer Assistance Program
- Breaking the Silence - Lawyer Suicide
- A Chance to Serve
- Welcome to the Legal Profession
- Women Bar Leaders Encourage Use of Lawyer Assistance Program
- Impairment in the Legal Profession - A guide for New Bar Councilors and Local Bar Leaders

Articles

PALS and FRIENDS columns are submitted quarterly to the State Bar *Journal.* Monthly articles are submitted to the *Campbell Law Observer* to develop awareness of the Lawyer Assistance Program and impairing issues lawyers may face.

Volunteer Development

Substantial efforts continue to be devoted to volunteer development. As of September 30, 2005, there were 122 PALS Volunteers and 92 FRIENDS Volunteers.

Training

The FRIENDS Conference was held on February 12, 2005, at the Grandover Resort in Greensboro, NC. Dr. Norman T. Reynolds, a psychiatrist, was the featured speaker.

The Voluntary Step Study Retreat for lawyers in recovery sponsored by the LAP's in North Carolina, Virginia, Tennessee, and South Carolina, was hosted by South Carolina at the Kanuga Conference Center, Hendersonville, North Carolina, and was held on April 22-24, 2005.

The 26th Annual PALS Meeting and

Workshop was held on September 30 - October 2, 2005, at the Quality Inn & Suites, Hendersonville, NC. Guest speakers included Jim Emmert, Robert Turnbull, and Mary Howerton.

Upcoming Events for 2006

The FRIENDS Annual Conference will be held on February 11, 2006, at the Grandover Resort, Greensboro, North Carolina.

The 27th Annual PALS Meeting and Workshop will be held on November 3-5, 2006, at the Holiday Inn SunSpree Resort, Wrightsville Beach, North Carolina.

Local Volunteer Meetings

The Lawyer Assistance Program continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery and allowing volunteers the chance to grow in their own recoveries. Local volunteer support meetings for PALS and FRIENDS are held in 16 locations. Details on meeting locations are available at the LAP website - www.nclap.org

Volunteer Communication

The Lawyer Assistance Program sends out *The Intervenor*, a newsletter, to all PALS Volunteers three to four times a year to enhance communication among the volunteer network. Volunteers have contributed by writing articles for *The Intervenor* and by sharing personal stories in the *CLO* and the State Bar *Journal*. John Parker of Charlotte edited the most recent issue of The Intervenor.

Case Management

Case management has four different stages:

1. Investigation - Initial contact with the program begins the investigative phase. All efforts at this stage are directed to determining if the lawyer has a problem with which LAP can assist, the nature of the problem, and if the client is willing to get assistance.

2. Treatment/Stabilization - This phase begins when a lawyer understands that he/she needs help and agrees to obtain assistance.

3. Monitoring/Aftercare - This begins when a lawyer has completed inpatient/outpatient treatment or initial therapy consultations and is stabilized in a recovery program. In this stage the volunteer support is most active and helpful.

4. Inactive Status - A file is placed on inactive status when the active role of the LAP terminates. This may occur when the lawyer completes an initial two-year contract of monitoring and no longer needs a monitor, lawyer dies, moves out of state, is disbarred, or no longer wants any assistance.

Case Management Statistics

Statistics about the program reflect the number of people getting help; they do not reflect the time it takes to deliver that assistance. A self referral might be appropriate for a phone evaluation and be immediately directed to a treating counselor to meet his/her needs. On the other hand, a third party initiated investigation may take weeks to complete and, even then, the file may be put on hold for months in order for there to be sufficient opportunity to ascertain if the lawyer truly needs assistance. Every effort is made not to interfere by offering assistance unless there is meaningful evidence suggesting that it is needed or the lawyer is actively seeking help. Even then, in the addictions area, assistance when offered is often refused at first and the LAP may spend months building up trust so that assistance can be received when the lawyer finally becomes receptive. Like cases in law practice, the problem cases can often take tremendous amounts of time to move forward. Our approach is never to give up on offering help, but often that means waiting until a situation ripens. The LAP brought a new professional clinician on board in April 2005, Towanda Garner, LAP Piedmont Coordinator. To be able to make client access to the LAP easier, the state of North Carolina is divided into three sections. Don Carroll handles cases in the western part of the state, Towanda Garner handles the piedmont section, and Ed Ward the eastern part of the state. Of course any lawyer may seek the help of any member of the professional staff. The continued expansion and utilization of trained volunteers will remain key in the future to bringing assistance to more lawyers who need it.

The LAP is currently handling 833 files. There are 468 PALS and 365 FRIENDS files.

PALS Referrals:	FRIENDS Referrals:
Physician - 2	BOLE - 1
Friend - 16	Friend - 4
Family- 36	Family - 10
DHC - 7	DHC - 8
Bar Staff - 39	Bar Staff - 41
Lawyer - 173	Lawyer - 96
Self - 118	Self - 162
Firm - 25	Grievance - 21
Judge - 12	Firm - 11
DA - 3	Another LAP - 2
Another LAP - 4	Unknown - 2
Law School -1	Judge - 4
Grievance - 8	Therapist - 2
Unknown - 11	EPA - 1
BOLE - 9	
Bar Examiner - 3	
Local Bar - 1	

Closed Files

Closed files since 2000 are 114.

Governance

Under the rules of the NC State Bar Council, the Lawyer Assistance Program is governed by a nine member board. The NC State Bar Council appoints the members of the Lawyer Assistance Program Board in three different groups: three councilors of the NC State Bar; three persons with experience and training in the fields of mental health, substance abuse, and addiction; and three bar members who currently serve as volunteers to the Lawyer Assistance Program. In order to avoid any perception that the LAP is not entirely separate from discipline, no member of the Grievance Committee may serve on the LAP Board. The current members of the LAP Board are: Sara Davis, councilor board member and LAP Chair; Terry Sherrill is a volunteer board member and chair of the PALS Committee; Joe C. Coulter, Mary Howerton, and Dr. Al Mooney serve as expert board members; Victor J. Boone is a councilor board members and LAP Vice-Chair, Paul Kohut and Fred Williams are LAP volunteers. Retiring from the 2005 LAP Board were Rachel Pickard, Don Harris, and Karl H. Stanley, MD.

LAP Board Meetings Scheduled For 2006

January 17-20, 2006
Sheraton Capital Center, Raleigh
April 18-21, 2006
Sheraton Capital Center, Raleigh
July 18-21, 2006
Date Not Confirmed, Site TBD
October 17-20, 2006
Sheraton Capital Center, Raleigh

The LAP Board meets quarterly during the time of the council meetings except in the fall, when the LAP Board meets if necessary, at the time of the annual PALS training meeting. ■

February 2006 Bar Exam Applicants

The February 2006 Bar Examination will be held in Raleigh on February 21 and 22, 2006. Published below are the names of the applicants whose applications were received on or before October 27, 2005. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Fred P. Parker III, Executive Director, Board of Law Examiners, PO Box 2946, Raleigh, NC 27602.

Frank Alan Abrams
Arden, NC
Eduardo Abrao-Netto
Cornelius, NC
Allan Rogers Adams
Wilmington, NC
Suzana Stoffel Martins Albano
Morrisville, NC
Brian Geoffrey Alexander
Cary, NC
Vincent E. Alexander
Belmont, NC
Millicent JoAnne Allen
Winston-Salem, NC
Natalie E. Frazier Allen
Cary, NC
Ruth M. Allen
Raleigh, NC
Vickie Allison-Spencer
Greensboro, NC
Durwood Kevin Altman
Hickory, NC
Pridgen Jeannette Amos
Winston-Salem, NC
Julie Jessica Anders
Hilton Head Island, SC
Larry Laron Archie
Virginia Beach, VA
Leslie Anne Argenta
Cary, NC
Laura Snead Arndt
Raleigh, NC
Asekesai L. Arnette
Miami, FL
Joey G. Arnold
Johnson City, TN
Jannice Ashley
Wake Forest, NC
Thomas Matthew Asmar
Charlotte, NC
Janan Ileen Assaf
Irvine, CA
Michael Charles Atkins
Durham, NC
Charles Daniel Atkinson
Spartanburg, SC
Hannah Alexandra Clare Auckland
Tempe, AZ
Tasha Dene' Auton
Hickory, NC
Frederick Hughes Bailey
New Bern, NC
Nikitra Shante Bailey
Raleigh, NC
Katherine Mary Desiree Baird
Stanley, NC
Anita L. Baker
Durham, NC
Angela Edwina Banks
Clayton, NC
Patrice Ariminta Barley
Durham, NC
Kimberly Diane Bartman
Philadelphia, PA
Rick Barton
Pembroke, NC
Amanda Marie Baxley
Sanford, NC
George Cooper Bell
Virginia Beach, VA
Hannah Rodman Bell
Virginia Beach, VA
H. Freeman Belser
Columbia, SC
Jennifer Jean Bennett
Wilmington, NC
Frank Bernard
High Point, NC
Mark Ronald Bilak
Cary, NC
Larissa M. Bixler
Chapel Hill, NC
Jason Gregory Blackwell
Dana, NC
Laura MacKallor Blakely
Mountain View, CA
Marjorie Griffin Blaney
Matthews, NC
Monica Boccia
Charlotte, NC
Michael Joseph Bogdan
Canton, OH
Stephanie Michelle Boler
Charlotte, NC
Dan W. Bolton
Frederick, MA
Leah Kathrine Boucher
Seattle, WA
Gary James Bowers
Thomasville, NC
Tiffany Germaine Bowers
Greenville, NC
Stephanie C. Bowes
Greensboro, NC
Andrew Boyd Bowman
Greensboro, NC
Sharon Grace Boyd
Hope Mills, NC
Montrale D. Boykin
Durham, NC
Jennifer Lyn Brand
Charlotte, NC
Suzanne S. Brauer
Charlotte, NC
Jonathan Vann Bridgers
Greenville, NC
T. Caroline Briggs-Sykes
Morrisville, NC
John duBayo Broderick
Charlotte, NC
Rhonda D. Brooks
Charlotte, NC
Amy Laura Broughton
Greeley, CO
Sondra D. Broughton
Durham, NC
Carrah Ann Brown
Raleigh, NC
Jennifer J. Brown
Havelock, NC
Oliver Beamer Brown
Charlotte, NC
Suzanne E. Brown
Wilmington, NC
Christian Ernst Buhrer
Charlotte, NC
Rex Burford
Wilmington, NC
Erin Lee Burnette
Eden, NC
Kristin Leah Burrows
Winston-Salem, NC
Richard Guy Bush
Alexandria, VA
Sarah Dohoney Byrne
Charlotte, NC
Mathias Cabour
Miami Shores, FL
Lee Knight Caffery
Highlands, NC
Angelina Elena Cagle
Hickory, NC
Capresha Dawne Caldwell
Derwood, MD
TiJuana S. Campbell
Hurtsboro, AL
Justin Campoli
Charlotte, NC
Enzo F. Cannizzo
Staten Island, NY
Cara Lynn Capponi
Troy, MI
Eric Andrew Carlson
Charlotte, NC
David Earl Cash
Raleigh, NC
Kerri Lynn Catino-Nason
Corolla, NC
John Vincent Cattie
Charlotte, NC
Raymond Yat Chan
Arcadia, CA
Judy Chang
Los Angeles, CA
Michael Weiland Chen
Woodbridge, VA
Lindsey Morgan Chepke
Durham, NC
Bob R. Cherry
Newport, NC
Carol Charnetta Chestnut
Morrisville, NC
Daniel Doyun Cho
Alexandria, VA
Jinwook Choi
Suwanee, GA
Natalie Nichole Christian
Raleigh, NC
Malissa Pierce Church
Huntersville, NC
Jeffrey G. Clay
Woodland Hills, CA
Neika M. Colbourne
Charlotte, NC
Bradley Ellis Connor
Hickory, NC
Leah Davenport Copeland
Virginia Beach, VA
Melissa Javon Copeland
Raleigh, NC
Peter Corbitt
Encinitas, CA
Raymond Tan Cordova
Raleigh, NC
Matthew Elliott Cox
Charlotte, NC
Jennifer Susan Kristen Cox-Rivera
Hertford, NC
Michael Patrick Coyne
Los Angeles, CA
Edward Matthew Craven
Boston, MA
Junius Allen Crumpler
Raleigh, NC
Robert Edward Culver
Charleston, SC
William Joseph Cunningham
Myrtle Beach, SC
Judith Marie Daly
Statesville, NC
DeLisa Levette Daniels
Greensboro, NC
Michelle Lynn Davis
Yanceyville, NC
Zandra Zelada Davis
Spring Lake, NC
Dennis Kyle Deak
Glen Allen, VA
Leslie Rae Deak
Arlington, VA
Zachary Phillip Deason
Matthews, NC
Montu Dinkar Desai
Spartanburg, SC
Tyreace L. Dixon
Charlotte, NC
Gene Wallingford Dodd
Charlotte, NC
Christine Dorrestein-Schultz
Chapel Hill, NC
Kenneth William Dougherty
Wake Forest, NC
Denise Michelle Douglas
Phoenix, AZ
Matthew Brandon Downs
Lansing, MI
Michelle Ann Duff
Greensboro, NC
Courtney Michelle Duncil
Charlotte, NC
Edward N. Durand
Chapel Hill, NC
Roslyn M. Eckel
Raleigh, NC
Erin Baker Edgar
Chapel Hill, NC
Al Ehsani
Reseda, CA
Daniel Joseph Ellowitch
Charlotte, NC
David Paul Ennis
Wilmington, NC
Tyler Epp
Charlotte, NC
Ryan Alan Eppenberger
Asheville, NC
Holly Jay Evans
Raleigh, NC
Valerie Lorraine Fearrington
Mebane, NC
Kimberly Kashena Fennell
Garner, NC

Timothy Robert Ferguson
Chapel Hill, NC
Jennings Wells Ferriss
Wilmington, NC
James R. Forrest
Durham, NC
Jonathan Ashley Fortner
Cherokee, NC
Douglas K. Foster
Baton Rouge, LA
Jennifer Lynne Fox
Raleigh, NC
Margaret C. Fox
Chocowinity, NC
Richard Lauman Fox
Raleigh, NC
Chad Cameron Freeman
Winston-Salem, NC
Christopher Alan Freeman
Denton, NC
Tracy McGuire Frick
Charlotte, NC
Traci Zelch Frier
Mint Hill, NC
William David Gaither
Cary, NC
Carla L. Gannon
Oak Isand, NC
Melba Lisa Garcia
Lawton, MI
N. Vail Gardner
Durham, NC
Erica Parham Garner
Clayton, NC
Donald Ray George
Westfield, NC
Deborah R. Gerhardt
Chapel Hill, NC
Emily Ruth Gifford
Cayce, SC
Elizabeth Marie Gillikin
Wilson, NC
William Miller Gilmore
Miami, FL
Hallie Geneva Gist
Raleigh, NC
Brian R. Goodwin
Charlotte, NC
Timothy D. Gore
Charlotte, NC
W. Frederick Gore
Morrisville, NC
Anita Gorecki-Robbins
Napa, CA
Harelda Mavis Gragg
Durham, NC
Frank Richard Graham
Cornelius, NC
Ronald James Grant
Greensboro, NC
Melissa Lynne Gray
Charlotte, NC
Philip Steven Griffith
Clemmons, NC
Laura Cleste Grimaldi
Durham, NC
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Morrisville, NC
Worth Timothy Haithcock
Goldsboro, NC
Karim H. Hanafy
Woodbridge, VA
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Charlotte, NC
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Durham, NC
Martin Kyle Harrison
Lewisville, NC
David E. Harvey
Tampa, FL
Lawton H. Hatley
Charlotte, NC
Gilda A. Hernandez
Long Beach, CA
Matthew J. Herrle
Morrisville, NC
E. Perry Hicks
Charlotte, NC
Suzannah L. Hicks
Charlotte, NC
Derek William Hilst
Charlotte, NC
Russell Grainger Hines
Columbia, SC
James Bach Hogan
Lenior, NC
Graham Eugene Holt
Durham, NC
Blake Jefferson Hood
Jacksonville, FL
Robert Nelson Hood
Ocean Isle Beach, NC
Robert Ross Hoon
Cary, NC
Aaron Mitchell Houck
Charlotte, NC
Elizabeth D. Howard
Wilmington, NC
Emily Howard
Charlotte, NC
Jennifer McClister Howard
Golden, CO
Michael Andrew Hudson
Charlotte, NC
Michaela Skvara Hudson
Raleigh, NC
Anna L. Huffman
Red Lodge, MT
Robert K. Hunoval
Wilmington, NC
Allen Richard Hunt
Greensboro, NC
Hilton Terry Hutchens
Fayetteville, NC
Simeon Olusegun Ilesanmi
Winston-Salem, NC
Stuart Innes
Chesapeake, VA
Ben Gibson Irons
Birmingham, AL
Akiko Ishihara
Durham, NC
Martina L. Jaccarino
Charlotte, NC
Michele Janette Jacobs
Knightdale, NC
Seneca Jacobs
Little Rock, AR
Tenisha Swazette Jacobs
Brown Summitt, NC
Chester Chia-Mon Jeng
La Habra, CA
Tamika I. Jenkins
Wilmington, NC
Kwangchul Ji
Broomall, PA
Anita Elizabeth Welch Johnson
Cherokee, NC
Archie Johnson
Conway, SC
Samuel Bishop Johnson
Washington, DC
Arin Briana Jones
Raleigh, NC
Dawn Trowell Jones
Canton, NC
Pamela L. Jones
Durham, NC
Theresa Marvine Jones
Charlotte, NC
Elizabeth Dana Kalua
Sanford, NC
Stephen M. Kapral
Boca Raton, FL
Eliza C. Kendrick
Greensboro, NC
Chantel Elizabeth Keys
Raleigh, NC
Bashir H. Khoury
Warren, MI
Unyoung Kim
Wonju Kangwondo, ZZ
Catherine E. Kimberley
Austin, TX
Meleaha Machelle Kimrey
Burlington, NC
Daniel Matthias Kincheloe
Richmond, VA
Brian Alexander Bryant King
New Bern, NC
Margaret Mary Kingston
Raleigh, NC
Andrew Marc Klein
Cary, NC
Jennifer Rose Kletter
Raleigh, NC
Yelizaveta Klimova-Troxler
Charlotte, NC
Byung-hee Ko
Madison, WI
Yunju Ko
Vienna, VA
Lev G. Kobrin
Sunny Isles Beach, FL
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Raleigh, NC
Alexis Rose Kropp
Charlotte, NC
Osang Kweon
Fairfax, VA
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Arden, NC
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Raleigh, NC
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Wilmington, NC
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Hamburg, NY
Joseph Patrick Latour
Charlotte, NC
Minh T. Le
Lexington, NC
April Zotecan Ledford
Cherokee, NC
Chrystal Chavis Lee
Charlotte, NC
Joon Kil Lee
San Jose, CA
Seung-Hyun Lee
Annandale, VA
Soo Hee Lee
Atlanta, GA
Urenna Nnenna Lekwauwa
Winston-Salem, NC
Anjelica Ruth Lewis
Morrisville, NC
Anthony Lewis
Seneca, SC
Ericka Loretta Lewis
Owings Mills, MD
John Edward Lewis
Cullowhee, NC
Sophia Jo-Chu Liao
Montgomery, AL
William Jacob Long
Birmingham, AL
C. Geyer Longenecker
Raleigh, NC
Paige Sullivan Loper
Tampa, FL
Osvaldo Lopez
Charlotte, NC
Christopher Cameron Loutit
Wilmington, NC
Garland E. Lowe
Southport, NC
Rashanda Lynette Lowery
Greensboro, NC
Sheila L. Luhn
Cary, NC
May Ly
Charlotte, NC
Mary Ellen Lyall-Morgan
Buies Creek, NC
Joseph Vladimir Macha
Agoura Hills, CA
Ryan Z. Maltese
Whitsett, NC
Rachel Batyia Mandell
Chapel Hill, NC
Ilana Calimafde Mark
Hickory, NC
Angela Orso Martin
Sanford, NC
Bryan P. Martin
Charlotte, NC
Michael Patrick Martin
Fuquay-Varina, NC
Joseph A. Martinez
Valdese, NC
Charles Denton Matthews
Greenville, SC
Morris Fonville McAdoo
Burlington, NC
Jack R. McCaffery
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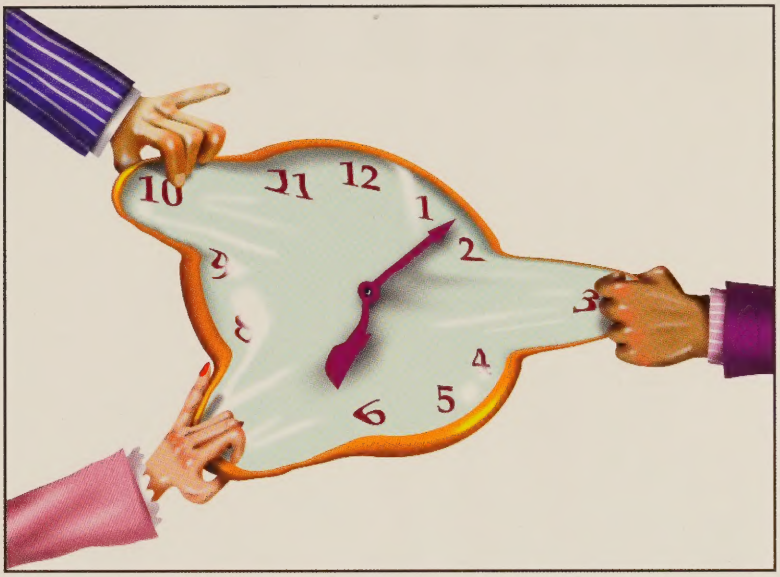

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